CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 239.

THE UNITED STATES, PETITIONER,

vs.

THE CORNELL STEAMBOAT COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI, FILED APRIL 21, 1905.
CERTIORARI AND RETURN FILED MAY 15, 1905.

(19724.)

a United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES, PLAINTIFF IN ERROR, (defendant below),
vs.
THE CORNELL STEAMBOAT COMPANY, DEFENDANT IN ERROR (plaintiff below).

Transcript of record. Error to the District Court of the United States for the Southern District of New York.

Printed under the direction of the clerk.

1 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Cornell Steamboat Company, petitioner, against The United States, defendant, a manifest error hath happened, to the great damage of the said The United States, as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 20th day of July, 1904, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct
2 that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable George B. Adams and George C. Holt, of the District Court of the United States for the Southern District of New York, this 22nd day of June, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

[L. S.] THOS. ALEXANDER,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

GEO. B. ADAMS,
U. S. District Judge.

3 UNITED STATES OF AMERICA,
Southern District of New York, ss.

I Thomas Alexander, clerk of the District Court of the United States of America, for the Southern District of New York, by virtue of the

foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from two to twenty-one, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The United States, plaintiff in error, against The Cornell Steamboat Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 2nd day of July, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

(Endorsed:) The U. S. Circuit Court of Appeals for the Second Circuit. The United States, plaintiff in error (defendant below), vs. The Cornell Steamboat Company, defendant in error (petitioner below). Writ of error. Henry L. Burnett, U. S. attorney, attorney for plaintiff in error. Service of a copy of the within writ of error is hereby admitted this 23rd day of June, 1904, Benedict & Benedict, attorneys for defendant in error. U. S. District Court, S. D. of N. Y. Filed Jun. 23, 1904.

4 *To the Honorable Addison Brown, judge of the District Court of the United States for the Southern District of New York.*

The petition of The Cornell Steamboat Company against The United States respectfully alleges, as follows:

First. That The Cornell Steamboat Company is a corporation duly incorporated under the laws of the State of New York, and is resident within this district.

Second. That on or about the 9th day of January, 1901, a certain lighter called the "Bangor," having on board 1,883 bags of sugar, while in the waters of the port of New York, was in danger of being destroyed by fire, and that the tug "R. G. Townsend," belonging to the petitioner, at great risk and peril saved the said lighter and the said cargo of sugar from destruction by said fire.

That the said sugar had been imported from a foreign country and was, therefore, subject to duty under the laws of the United States, and at the time of said fire was still in the possession and under the control of custom-house officers of the United States.

That thereafter the owners of the "Bangor" paid to the petitioner a satisfactory sum for their services in saving the said lighter.

That your petitioner filed a libel in the District Court of the United States for the Eastern District of New York, against the said cargo of sugar, to recover compensation for the services rendered in saving said sugar. That on said libel the firm of B. H. Howell, Son & Company appeared in the suit and claimed the said sugar as owners thereof, and filed an answer in the cause and gave a stipulation for value, and

5 that thereafter the said cause came on for trial in said District Court, and on the 20th day of April, 1901, the said court made its decree, wherein and whereby it adjudged that the amount of the award to the libellants for salvage services rendered was fixed at ten per cent of the value of the property saved. And that, as it appeared that

the duties on said sugar, amounting to $6,000, had been paid to the Government of the United States provisionally and in such wise that, if the said sugar had been destroyed by said fire the said owners of said sugar would have been entitled to claim a repayment to them by the United States of the amount of duties upon said sugar, the owners of said sugar should pay to this petitioner ten per cent upon the value of said cargo of sugar, less the $6,000 which had been paid or deposited with the United States. And that a copy of said decree is hereto annexed and marked "Exhibit A."

Third. And the petitioner alleges that, by reason of the services rendered as above stated, the amount of $6,000 in duties aforesaid was saved to the United States. And that the petitioner is entitled to have and claim against the United States, by reason of said services and said decree, the sum of six hundred dollars, or ten per cent of the amount of said duties, inasmuch as the said duties in the possession of the United States were entirely saved to the United States by the services of the petitioner as above stated.

Wherefore the petitioner prays for a judgment or decree that the United States shall pay to the petitioner the said sum of six hundred dollars and costs.

BENEDICT & BENEDICT,
Petitioner's Attys., 68 Wall street, N. Y.

CORNELL STEAMBOAT CO.,
By S. D. COYKENDALL, *Pt.*

6 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Samuel D. Coykendall, being duly sworn, says that he is president of the petitioner herein, which is a corporation, and that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

S. D. COYKENDALL.

Sworn to before me this 1st day of August, 1901.

[SEAL.]

WM. F. JONES,
U. S. Comm., S. D. of N. Y.

7 EXHIBIT A.

At a stated term of the District Court of the United States for the Eastern District of New York, held at the court room, in the borough of Brooklyn, on the 20th day of April, 1901.

Present: Hon. Edward B. Thomas, district judge.

CORNELL STEAMBOAT COMPANY, for itself as owner, and for the crew of the steam tug "R. G. Townsend,"
vs.
1,883 BAGS OF SUGAR LATELY ON board the lighter "Bangor."

This cause coming on to be heard on the pleadings and proofs of the parties, and having been argued and submitted, and due deliberation

having been had, it is, on motion of Benedict & Benedict, libellant's proctors,

Ordered, adjudged, and decreed by the court that the amount of the award made to the libellants for the salvage services rendered is fixed at ten per cent of the value of the property saved, and that as it appears that the market value in New York of the sugar saved was $18,127.74, but that the invoice value was $12,245, and that the duties thereon, amounting to $6,000, had been paid to the Government of the United States, and that if the said sugars had been burned the claimants herein would have been entitled to a rebate of said duties, it is also

8 Ordered, adjudged, and decreed that the claimants herein pay to the libellant herein the sum of twelve hundred and twenty-four 50/100 dollars, being ten per cent on the sum of twelve thousand two hundred and forty-five dollars, the invoice value of said sugars, together with their costs to be taxed.

And said costs having been taxed at the sum of forty-nine 81/100 dollars, it is further

Ordered that the libellants recover the sum of twelve hundred and seventy-four 31/100 dollars, and that said claimants be condemned to pay the said sum; and it is further

Ordered and adjudged that the said salvage award be apportioned three-fourths to the owners of said tug "R. G. Townsend" and one-fourth to the crew on board at the time of said service, the same to be divided in proportion to their wages.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) Petition. Filed Aug. 1, 1901.

9 United States District Court, Southern District of New York.

CORNELL STEAMBOAT COMPANY } Demurrer.
vs.
THE UNITED STATES. }

The defendants above named, by Henry L. Burnett, their attorney for the Southern District of New York, demur to the petitioner's petition herein as follows:

First. The court has no jurisdiction of the alleged cause of action against the defendants.

Second. The petition does not state facts sufficient to constitute a cause of action against said defendants.

Dated New York, December 21st, 1901.

HENRY L. BURNETT,
United States Attorney, Attorney for Defendants,
Room 50, P. O. Building, New York City (Borough of Manhattan).

(Endorsed:) Demurrer. Filed Jany. 7th, 1902.

10 At a stated term of the District Court of the United States of America for the Southern District of New York, held at the United States court rooms in the city of New York, on Tuesday, the 5th day of April, in the year of our Lord one thousand nine hundred and four.

Present: The Honorable George B. Adams, district judge.

THE CORNELL STEAMBOAT COMPANY
vs.
THE UNITED STATES.

This case having been heard on the petition and demurrer interposed thereto, and argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now

Ordered, adjudged, and decreed by the court that the demurrer be overruled, and that the defendant have one week to answer herein.

GEORGE B. ADAMS.

(Endorsed:) Copy decree overruling demurrer. Filed April 7, 1904.

11 At a stated term of the District Court of the United States of America for the Southern District of New York, held at the United States court rooms in the city of New York, on Tuesday, the 19th day of April, in the year of our Lord one thousand nine hundred and four.

Present: The Honorable George B. Adams, district judge.

THE CORNELL STEAMBOAT COMPANY
vs.
THE UNITED STATES.

On motion, no opposition being made, and due deliberation being had in the premises, it is now

Ordered, adjudged, and decreed by the court that the answer interposed herein be withdrawn, and that the decree entered herein on the 5th of April inst., be amended by striking out the words "and that the defendant have one week to answer herein." And it is further

Ordered and decreed that this cause be submitted to the court for a written opinion setting forth the specific findings by the court of the facts herein and the conclusions of the court upon all questions of law involved in the case as required by the statute, and to render judgment thereon.

GEO. B. ADAMS.

Approved as to form.

HENRY L. BURNETT,
U. S. Atty.

(Endorsed:) Decree. Filed April 19th, '04.

12 United States District Court, Southern District of New York.

CORNELL STEAMBOAT COMPANY } Salvage on duties collected.
vs. Action against the United States,
THE UNITED STATES. } May, 1904.

Benedict & Benedict, for petitioner.

Henry L. Burnett, United States attorney, and Arthur M. King, assistant U. S. attorney, for defendants.

ADAMS, J.

This is a petition filed by the Cornell Steamboat Company against the United States, for the recovery of salvage on certain duties collected by

the Government. The main facts have been, in substance, agreed upon as follows:

"FINDINGS OF FACT.

"First. The Cornell Steamboat Company is a corporation duly incorporated under the laws of the State of New York, and is resident within the Southern District of New York, and is and was on the 9th day of January, 1901, the owner of the steam tug 'R. G. Townsend.'

"Second. On or about the 9th of January, 1901, a certain lot of 1883 bags of sugar, while on board of a certain lighter called the "Bangor," in the waters of the port of New York, was in danger of being destroyed by fire, and the tug 'R. G. Townsend,' belonging to the petitioner, at great risk and peril, saved the said cargo of sugar from destruction by said fire.

"Third. The said sugar had been imported from a foreign country, and was subject to duty under the laws of the United States; and
13 at the time of said fire had not been delivered to the consignees and was still in the possession and under the control of custom-house officers of the United States.

"Fourth. The duties on said sugar amounted to $6,000, and said sum had been paid to the Government of the United States.

"Fifth. On the 25th of February, 1901, petitioner filed a libel in the District Court of the United States for the Eastern District of New York, against the said cargo of sugar, to recover salvage compensation for the services rendered in saving said sugar. The owner of the sugar thereafter appeared and claimed the sugar, and filed an answer to the libel, and such proceedings were had that on the 20th day of April, 1901, the court made a decree awarding the petitioner salvage for its said services in saving the sugar, and fixing the amount of the award for said salvage services at ten per cent of the value of the property saved, and by said decree awarded to the petitioner as salvage the sum of $1,274.03.

"Sixth. In fixing said sum the District Court considered the invoice value of the sugar only, and in no way awarded a percentage of the value of the estimated duties saved to the United States by said salvage services.

"Seventh. A copy of said decree is a copy of said decree referred to above.

"Eighth. Petitioner has duly filed its petition herein in this district and served a copy thereof on the United States district attorney for this district and mailed a copy of the same by registered letter to the Attorney-General of the United States and filed affidavit of such service and mailing with the clerk of this court."

The defendants here ask for the following conclusions of law, viz:

"Second. If the said sugar had been destroyed by fire the owners thereof would have been entitled under the statute to make application to
14 the Secretary of the Treasury for a refund of the duties paid upon said sugar, but that the granting of said petition would have been entirely a matter of discretion with the said Secretary of the Treasury, and his decision in the premises would have been final and not subject to review by this or any other court.

"Fourth. If said sugar had been destroyed by fire the Government would not have lost the right to its duties, but could have maintained a suit for their recovery."

The finding of these conclusions would tend to determine the matter in favor of the Government, because it might then rest with the Secretary of the Treasury to determine whether the salvage should be paid or not. Although it may be assumed that the Secretary would act correctly in the case, in such event there would be no legal right to a judgment.

The Tucker Act, under which this action was brought, provides (chap. 359):

"Be it enacted, &c., That the Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon the Constitution of the United States or any law of Congress * * * or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable.

* * * * * * *

"Sec. 2. That the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

"Sec. 3. * * *

"The judgment of said court or the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. * * *

"Section 7. That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts." (1 Suppt. to Rev. Stats., pp. 559, 561.)

The claim in this action is founded upon an implied contract, based upon the principle that the Government has undertaken to do what it ought to do. The law has been recently discussed in a salvage claim against the Government, and it was held that the United States courts have jurisdiction to determine such a claim. (United States v. Morgan, 99 Fed. Rept., 579.)

By reason of the amount involved that action was in the Circuit Court, but the discussion applies here, and it is unnecessary to go over the same ground.

On the question of the conclusions sought the Government refers to D. M. Ferry & Co. v. United States (85 Fed. Rept., 550). That was a case where a petition was filed under section 2984 of the Revised Statutes,

and the Secretary of the Treasury made a ruling relative to duties which had been paid. It was sought to review such ruling, but the court held it could not be done. Referring to the case of Nichols v. United States (7 Wall., 122), it was said (555):

"To avoid the effect of the Nichols case upon the question before us, it is pointed out that in that case the revenue laws themselves
16 provided a remedy by which the taxpayer might bring the Secretary's decision under review in the courts, but that here there is no such provision. This is true, but the Nichols case did not proceed on the ground that there had been an appeal to the courts provided for within the revenue acts themselves; nor was it intimated that a suit in the Court of Claims would have been permitted had no such appeal to the courts been provided. On the contrary, the plain effect of the decision is that if the intention of Congress is manifest to create the Secretary of the Treasury a tribunal to decide whether a wrong has been committed under the revenue law, and has made no provision for an appeal, because the revenue law provides a complete system within itself, the presumption must be that it was intended to make the decision of the special tribunal thus established final."

It would seem that no conclusion of law should be made here which would apparently affect the jurisdiction of this court to determine the question involved, and I decline to make the Government's proposed conclusions.

I adopt the following conclusions of law, as proposed by the petitioner, viz:

"CONCLUSIONS OF LAW.

"First. At the time of the salvage aforesaid the United States had an interest in said sugar to the amount of $6,000.

"Second. By reason of said salvage service the said sum of $6,000 in duties has been saved to the United States.

"Third. The petitioner is entitled to recover as salvage herein the same percentage on the sum so saved to the United States as was allowed by the United States District Court for the Eastern District of New York against the sugar itself, to wit, ten per cent.

"Fourth. The petitioner is entitled to judgment against the United States for the sum of $600."

Judgment for petitioner for the sum of $600.

17 At a stated term of the District Court of the United States for the Southern District of New York, held at the court room in the borough of Manhattan, on the 2nd day of June, 1904.

Present: Hon. George B. Adams, district judge.

THE CORNELL STEAMBOAT COMPANY, PETITIONER,
vs.
THE UNITED STATES, DEFENDANT.

This cause coming on to be heard, and having been argued and submitted by counsel for the respective parties, and the court having, by its findings of fact and conclusions of law, found that the petitioner is

entitled to recover herein of the United States, by reason of the matters and things in the petition stated, the sum of six hundred dollars.

Now, on motion of Benedict & Benedict, attorneys for the petitioner, it is

Ordered, adjudged, and decreed by the court that the petitioner—the Cornell Steamboat Company—recover of the United States, defendant, the said sum of six hundred dollars, together with the sum of three 60/100 dollars, disbursements, for fees of the clerk of court, amounting together to the sum of six hundred and three 60/100 dollars; and that judgment be entered for said sum of six hundred and three 60/100 dollars in favor of said petitioner against the said defendant.

GEO. B. ADAMS.

(Endorsed:) Final decree and judgment. Filed June 2, 1904.

18 By the honorable George B. Adams and George C. Holt, judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To the Cornell Steamboat Company, greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the borough of Manhattan, in the city of New York, in the district and circuit above named, on the 20th day of July, 1904, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein The United States, plaintiff in error (defendant below), and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 22nd day of June, in the year of our Lord one thousand nine hundred and four, and of the Independence of these United States the one hundred and twenty-eighth.

(Sgd.) GEO. B. ADAMS,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) Citation. Filed June 2, 1904.

19 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES, PLAINTIFF IN ERROR (DEFENDANT below),
vs.
THE CORNELL STEAMBOAT COMPANY, DEFENDANT IN error (petitioner below).

Assignment of errors.

Afterwards, to wit, on the 22nd day of June, 1904, October term of the above court, come the United States of America, by Henry L.

Burnett, their attorney for the Southern District of New York, and say that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

First. That the District Court erred in refusing to find the defendant-plaintiff in error's second proposed conclusion of law, as follows:

"Second. If the said sugar had been destroyed by fire, the owners thereof would have been entitled under the statute to make application to the Secretary of the Treasury for a refund of the duties paid upon said sugar, but that the granting of said petition would have been entirely a matter of discretion with the said Secretary of the Treasury, and his decision in the premises would have been final and not subject to review by this or any other court."

20 Second. That the District Court erred in refusing to find the defendant-plaintiff in error's fourth proposed conclusion of law, as follows:

"Fourth. If said sugar had been destroyed by fire, the Government would not have lost the right to its duties, but could have maintained a suit for their recovery."

Third. The District Court erred in not finding the defendant-plaintiff in error's second and fourth conclusions of law, and in not giving judgment thereon in favor of the defendant-plaintiff in error, dismissing the petitioner-defendant in error's petition.

Fourth. The District Court erred in finding as a conclusion of law that the claim in this action is founded upon an implied contract, based upon the principle that the Government has undertaken to do what it ought to do.

Fifth. The District Court erred in holding that no conclusion of law should be made here which should apparently affect the jurisdiction of this court to determine the question involved, and in not dismissing the petition for lack of jurisdiction.

Sixth. The District Court erred in holding that at the time the salvage occurred the United States had an interest in said sugar to the amount of six thousand dollars, or in any other sum.

Seventh. The District Court erred in holding that by reason of said salvage service the said sum of six thousand dollars in duties, or any other sum, had been saved to the United States.

Eighth. The District Court erred in holding that the petitioner is entitled to recover as salvage herein the same percentage on the sum so saved to the United States as was allowed by the United States

21 District Court for the Eastern District of New York against the sugar itself, to wit, ten per cent.

Ninth. The District Court erred in holding that the petitioner is entitled to judgment against the United States for the sum of six hundred dollars, or any other sum.

Tenth. The District Court erred in granting judgment for the petitioner for the sum of six hundred dollars.

Eleventh. The District Court erred in overruling the demurrer to the petition interposed by the defendant-plaintiff in error.

Twelfth. The District Court erred in not sustaining the demurrer of the defendant-plaintiff in error to the petition, on the ground that the court had no jurisdiction of the alleged cause of action.

Thirteenth. The District Court erred in not sustaining the demurrer of the defendant-plaintiff in error to the petition, on the ground that the said petition did not state facts sufficient to constitute a cause of action against the said defendant-plaintiff in error.

HENRY L. BURNETT,
United States Attorney for the Southern District of New York, and Attorney for the Defendant-Plaintiff in Error.

(Endorsed:) Assignment of errors. Filed June 22/1904.

22 United States District Court, Southern District of New York.

THE CORNELL STEAMBOAT COMPANY, PETITIONER,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT.

It is hereby stipulated and agreed that a bill of exceptions on behalf of the defendant is hereby dispensed with, it appearing that all questions which could therein be raised can be raised by the assignments of error on appeal.

Dated New York, June 21st, 1904.

(Sgd.) BENEDICT & BENEDICT,
Attorneys for Petitioner.

(Sgd.) HENRY L. BURNETT,
United States Attorney.

(Endorsed:) Stipulation. Filed June 27, 1904.

23 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
THE CORNELL STEAMBOAT COMPANY, DEFENDANT IN error.

It is hereby stipulated and agreed that the foregoing is a true and complete record in the above-entitled case, and that it be printed as such.

Dated New York, June 21st, 1904.

HENRY L. BURNETT,
United States Attorney, Atty. for Plaintiff in Error.
BENEDICT & BENEDICT,
Attorneys for Defendant in Error.

24 United States Circuit Court of Appeals for the Second Circuit.

No. 107.—October Term, 1904.

Argued December 21, 1904. Decided March 1, 1905.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THE CORNELL STEAMBOAT COMPANY, DEFENDANT in error.

Error to the District Court of the United States for the Southern District of New York.

Before Judges Wallace, Lacombe, and Coxe.

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, in favor of the defendant in error, which was plaintiff below. The claim against the United States was prosecuted under the Tucker Act of March 3, 1887 (1 Supp. to Rev. Stat., 559), which confers concurrent jurisdiction upon the Court of Claims and the several District and Circuit Courts in suits against the United States for "all claims founded upon the Constitution of the United States * * * or upon any contract expressed or implied with the Government of the United States, or for damages liquidated or unliquidated in cases not founded in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

LACOMBE, circuit judge:

The facts out of which the claim arises are these: The firm of B. H. Howell, Son & Co. imported a lot of sugar into the port of New
25 York, and by the act of importation became indebted to the Government for customs duties thereon. The market value of the sugars in that port on January 9, 1901, was $18,127.74, which included the duties assessed at $6,000. The sugar came into the possession of the customs officers, the Government having a lien upon the same for the duties. The duties were paid, but the sugar had not been delivered to the consignee, remaining in the custody of the officers of the customs on January 9, 1901. It was on board a certain lighter called the "Bangor," in the waters of the port of New York, and on the day named was in danger of being destroyed by fire, whereupon the tug "R. G. Townsend," belonging to the plaintiff below, at great risk and peril, saved the lighter and the cargo of sugar from destruction by said fire. Thereafter the owners of the "Bangor" settled with the steamboat company for salvage services, and the last-named company brought a libel in the District Court, Eastern District of New York, against "1,883 bags of sugar, lately on board the lighter 'Bangor,'" to recover for salvage services rendered to the cargo. The cause came on for trial; it was found that libellant was entitled to salvage, and the award was fixed at 10 per cent of the value of the property saved. The court was satisfied that had the cargo been destroyed consignees would have been entitled to a rebate of the duties paid ($6,000) under sec. 2984, U. S. Rev. Stat., and therefore, concluding that the Government was interested in the sugar to that amount, awarded ten per cent against the consignee only on the balance left after deducting that sum from the market value. No award was made against the United States in that proceeding in rem in admiralty, presumably because the court was satisfied that it had no jurisdiction to bring the Government in as a party to such suit. The Davis (10 Wall., 16).

Thereupon the plaintiff filed under the Tucker Act a petition the equivalent of a complaint, bill, or libel, setting forth the facts above recited. Defendant demurred; demurrer was overruled with leave to answer; answer was served, but was subsequently withdrawn and
26 the case submitted to the court upon the pleadings for a written opinion setting forth the specific findings of fact and conclusions of law and rendering judgment thereon in conformity to the practice under that act.

If it be assumed that the Government had such an interest in the sugar as to be directly benefited by the salvage service, the District Court under the Tucker Act would have jurisdiction to entertain petition for a salvage award. It is unnecessary to add anything to the discussion of this subject which will be found in the opinion of the Court of Appeals for the Fourth Circuit, U. S. v. Morgan (99 F. R., 570). The important and fundamental question in the case is as to the construction of section 2984. It reads as follows:

"SEC. 2984. The Secretary of the Treasury is hereby authorized, upon production of satisfactory proof to him of the actual injury or destruction, in whole or in part, of any merchandise, by accidental fire or other casualty, while the same remained in the custody of the officers of the customs in any public or private warehouse under bond * * * or while in custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon, and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be."

Provision for such abatements or refunds is made in:

"SEC. 3689. There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same, respectively; and such appropriation shall be deemed permanent annual appropriations. * * * For refunding duties paid or accruing on goods, wares, or merchandise injured or destroyed by accidental fire or other casualty while in the custody
of the officers of customs, in any public or private warehouse,
27 * * * or after their arrival within the limits of any port of
entry of the United States, and before the same have been landed under the supervision of the officers of the customs."

It is contended by plaintiff in error that under these sections there is confided to the Secretary of the Treasury an absolute and irreviewable discretion to refund or to refuse so to do. That "if the sugar had been entirely destroyed by fire there was no legal obligation on the part of the Secretary of the Treasury to refund the duties paid, even though manifest justice indicated that a petition for refund should be granted." In support of this proposition there is cited the decision of the Court of Appeals for the Sixth Circuit in D. M. Ferry & Co. v. U. S. (85 F. R., 550). In that case, as in this, imported merchandise which had paid duty was destroyed by fire while in the custody of the customs officers and petition was filed under the Tucker Act to obtain a refund of duties. It appeared that more than a year before the passage of that act a claim for the same refund had been presented to the Secretary of the Treasury and by him rejected. This was sufficient to defeat the plaintiff, because the section of the Tucker Act which gave jurisdiction to the courts expressly provided that nothing therein "shall be construed as giving to either of the courts therein mentioned jurisdiction to hear and determine * * * claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." The Court of Appeals, however, discussed

section 2984 at considerable length. It held that Congress might, if it saw fit, make the Secretary the final arbiter in any class of cases arising under the revenue laws to determine in a quasi-judicial manner whether by virtue of those laws any claim against the Government has arisen in favor of the petition; and that "as neither sec. 2984 nor any other part of the revenue laws gave to the Federal courts appellate power to revise the decision of the Secretary of the Treasury, under the section he was made the final judge or tribunal to decide upon the validity
28 of the claim in question." Undoubtedly it is the Secretary, not the court, who is to pass upon the proofs; it is his judgment, not the court's which is to be satisfied that the facts authorizing refund exists. In the Ferry case he rendered a decision that "on the facts stated the petitioner did not bring his case within the section, and that therefore the petition filed under the section must be rejected." The court had no power to review or revise that decision and, therefore, threw out the claim. But if on the other hand the facts stated by the petitioner brought his case within the section and such proof was presented that the Secretary became satisfied of the existence of those facts, we do not find in the Ferry case authority for the proposition that nevertheless the Secretary might refuse to allow the refund arbitrarily and capriciously. On the contrary there is high authority the other way. In Supervisors v. U. S. (4 Wall., 435), the court considered a statute which provided that a board of supervisors "may, if deemed advisable," levy a special tax to pay certain indebtedness. It held the language to be peremptory, saying: "The conclusion to be deduced from the authorities is, that where power is given to public officers in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty." See also City of Galena v. Amy (5 Wall., 705). An interesting case to the same effect where the language construed was "whenever it shall be shown to the satisfaction of the * * * commissioners that the city sold * * * and received value
29 therefor * * * and it shall appear equitable to them to make such conveyance"—is found in Provisional Municipality v. Lehman (57 F. R., 324). In U. S. v. Thoman (156 U. S., 353), where a consideration of the full text of the statute led the court to the conclusion that the use of the word "may" was intended by the legislature to be permissive only, they quoted with approval from Minor v. Mechanics' Bank (1 Pet., 46), the statement that: "no general rule can be laid down upon this subject further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment."

It seems quite apparent that the intent and object of the legislature was to afford relief to unfortunate importers who might be able to satisfy

the Secretary by sufficient proof that they came within the terms of the section. So careful was the legislature to secure that relief that it provided a perpetual annual appropriation from which the repayments might be made. It would certainly defeat that object if after being satisfied that the proofs established all the prerequisite facts which the section called for, the Secretary might nevertheless arbitrarily refuse to make the payment.

In the case at bar all question as to whether the proof produced of actual injury, etc., by accidental fire while in the custody of the customs officers was satisfactory to the Secretary is eliminated. The case is presented on a demurrer which concedes all the facts averred. It must therefore stand conceded that had the salvors not intervened a loss would have occurred under circumstances which would have brought the importer within the provisions of sec. 2984. It can not be supposed that the Secretary would find the undisputed facts otherwise than as they were proved to him to be; it may fairly be assumed that undisputed facts would be susceptible of convincing proof; and since all the facts enumerated in the section are conceded it must be presumed that their presentation to the Secretary would satisfy him that the importer was within the terms of the section.

30 The next question is whether by reason of its liability to refund the $6,000 duties in case of the destruction of the property the United States had such an interest in that property that salvors, who by saving the property save the Government from paying out such sum, may be entitled to a salvage award on the basis of the money thus put to risk.

Counsel for the petitioner calls attention to an English authority where the proposition established was in principle the same as that presented here. Five Steel Barges (15 P. D. Rep., 142). In that case salvage services were rendered to five barges built by defendant for the Government and which were being towed from Chepstow to Portland. At the end of the towage two of barges were given up to the Government. An action of salvage in personam was brought against defendants in respect to these two barges, and in rem against the remaining three. It was argued that plaintiffs were not entitled to recover as against the two barges, because they were not asserting their right as a maritime lien, but have instituted their action in personam. The court said:

"As to the two which have been given up to the Government, I think it is perfectly clear on the authorities that an action in personam lies against the owners of a vessel saved, even though the property has been transferred to others, and the lien lost. In this case, however, the property does not appear to have been in the defendants, because it would, I think, under the contract, be in the Government. But on this point I am of opinion that the right to sue in personam is not confined to the case of the defendant being the actual legal owner of the property saved. I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract; but it does not

necessarily do so. It is a legal liability arising out of the fact
31 that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property. In this case the defendants were under contract with the Government to supply them with barges at a certain price. Payment was to be made by certain instalments, of which only one remained unpaid at the time of the services. I think if * * * these instalments were all paid on condition that the barges should be delivered all within twelve months of the date of the contract, it would follow that, if defendants had not been in a position to deliver the barges within the twelve months, then either they would have been liable in damages for not performing the contract, or liable to make restitution of the instalments which had been paid them on conditions not fulfilled by them. It appears to me then that they had substantially an interest to the full amount of the barges at the time of the services, and that the same moral obligation to which the law has given force in the case of an owner applies to those who have an interest in the property. This is certainly the business-like view of the matter."

In the Port Victor, 9 Asp. Mar. Law Cas. (N. S., 163), where Government stores were being carried at the risk of charterers, the charterers were held to a personal liability to pay salvage because they "were directly interested in the preservation of the goods and the salvage service was a direct benefit to them." Justice Jeune cited the Five Steel Barges with approval, holding that "a man who has had a benefit arising out of the saving of property is liable to a claim for salvage no less than the actual owner of it." The Port Arthur was affirmed and the principle laid down in the Five Steel Barges favorably commented on by the Court of Appeals in 9 Asp. Mar. Law Cas. (N. S., 183).

We are of opinion that the Government in the case at bar had
32 an interest in the sugar to the extent of the duties. It had a lien on the sugar till the duties were paid, and since they were paid under a statute which provided for their refund in case of the destruction of the sugar by accidental fire it had an interest which should in all fairness respond to the individuals whose salvage services prevented the loss which the Government would sustain by making such refund.

The judgment of the district court is affirmed.

Arthur M. King, assistant United States attorney, for the plaintiff in error.

R. D. Benedict, for the defendant in error.

33 United States Circuit Court of Appeals for the Second Circuit.

No. 107.—October term, 1904.

Argued December 21, 1904. Decided March 2, 1905.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THE CORNELL STEAMBOAT COMPANY, DEFENDANT in error.

Error to the District Court of the United States for the Southern District of New York.

Before Judges WALLACE, LACOMBE, and COXE.

WALLACE, circuit judge (dissenting):

I can not concur in the judgment of the court. I think that the statute (§ 2984) is permissive and not mandatory, and was intended to authorize the Secretary of the Treasury to remit any duties which in justice and according to his judgment the importer ought not to lose. If it is mandatory, the Secretary has no discretion and the Government may become liable to refund duties on merchandise injured or destroyed without the fault of any of its officers and in their custody merely for the accommodation of the importers and under circumstances in which the loss should properly and reasonably fall upon the importer rather than upon the Government. The intention of Congress to subject the Government to such a liability in cases where the importer would have no legal claim against an individual under the same circumstances is not to be inferred in the absence of any more significant evidence than the phrase "The Secretary of the Treasury is hereby authorized." The words "hereby authorized" are equivalent to "may." Even

34 when the word "shall" is used in statutes, it is, as against the Government, to be construed as "may" unless a contrary intention is manifested. R. R. Co. v. Hecht (95 U. S., 168). Clearly "may" should not be construed as against the Government as "shall," unless this meaning is compelled by the nature of the power confided, or because the exercise of the power to its fullest extent is a plain duty to those interested in it.

35 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the post-office building in the city of New York on the 13th day of March, one thousand nine hundred and five.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, circuit judges.

UNITED STATES, PLAINTIFF IN ERROR,
vs.
CORNELL STEAMBOAT COMPANY, DEFENDANT in error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

W. J. W.
E. H. L.
A. C. C.

36 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. U. S. vs. Cornell Steamboat Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 13, 1905. William Parkin, clerk.

37 UNITED STATES OF AMERICA, *Southern District of New York, ss.*

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 36 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States against Cornell Steamboat Co., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 7th day of April, in the year of our Lord one thousand nine hundred and five, and of the independence of the said United States the one hundred and twenty-ninth.

[SEAL.] WM. PARKIN, *Clerk.*

38 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which the United States is plaintiff in error, and the Cornell Steamboat Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

39 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Melville W. Fuller, Chief Justice of the

United States, the fourth day of May, in the year of our Lord one thousand nine hundred and five.

[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

40 (Indorsed:) File No. 19724. Supreme Court of the United States. No. 624, October term, 1904. The United States vs. The Cornell Steamboat Company. Writ of certiorari. United States Circuit Court of Appeals, Second Circuit. Filed May 12, 1905. William Parkin, clerk.

41 Supreme Court of the United States, October term, 1904.

THE UNITED STATES, PETITIONER, *vs.* THE CORNELL STEAMBOAT COMPANY. } No. 624.

Stipulation as to return.

It is hereby stipulated by counsel for the parties in the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Circuit Court of Appeals for the Second Circuit to the writ of certiorari issued herein.

H. M. HOYT,
Solicitor-General.
ROBERT D. BENEDICT,
Counsel for Respondents.

May 5, 1905.

(Endorsed:) U. S. vs. Cornell Steamboat Co. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed May 12, 1905. William Parkin, clerk.

42 *To the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under direction of counsel for the petitioner is hereby certified as a return to the writ of certiorari issued herein.

Dated New York, May 12th, 1905.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

43 (Indorsed:) United States Circuit Court of Appeals, Second Circuit. U. S. v. Cornell Steamboat Co. Return to certiorari.

44 (Indorsement on cover:) File No. 19724. Supreme Court U. S. October term, 1904. Term No. 624. The United States, petitioner, vs. The Cornell Steamboat Company. Writ of certiorari and return. Filed May 15, 1905.

O

Supreme Court, U. S.
FILED
APR 27 1905
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
THE CORNELL STEAMBOAT COMPANY, RESPONDENT.

No. 634

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT, AND BRIEF

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
THE CORNELL STEAMBOAT COMPANY, RESPONDENT.
No. ——.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT, AND BRIEF.

The Solicitor-General, on behalf of the United States, respectfully prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit in the above-entitled case affirming that of the District Court for the Southern District of New York awarding respondent, as salvage, 10 per cent of the duties paid upon a cargo of sugar alleged to have been saved by it from destruction by fire.

The judgment below was based upon the theory that if the sugar had been destroyed the United States would have been obliged to refund the duties under section 2984 Revised Statutes, which provides:

> SEC. 2984. The Secretary of the Treasury is hereby *authorized*, upon production of satisfactory proof *to him* of the actual [industry] [injury] or destruction, in whole or in part, of any merchandise, by *accidental fire*, or other casualty,

while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs, *to abate or refund*, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon, and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be.

The case presents several questions of special importance.

1. Have Federal courts jurisdiction under the Tucker Act of a suit like this against the Government arising under the revenue laws?

2. Are import duties subject to salvage claims?

3. Under Admiralty rule 19, will a salvage suit *in personam* lie against the Government for saving duties when it did not request the service?

4. Under section 2984 R. S., may the courts, in advance of a decision by the Secretary of the Treasury, and upon a hypothetical case, determine that a refund must have been made if the goods had been destroyed?

This suit is an invasion of the revenue system. The attack upon import duties is novel and unprecedented. Admiralty rule 19 has been entirely ignored. The application of section 2985 Revised Statutes is unwarranted, and may subject the Government to no end of claims and litigation in the courts. Substantial grounds for issuing the writ of certiorari are therefore presented.

STATEMENT OF CASE.

In January, 1901, a tug belonging to respondent is alleged to have saved from destruction by fire, in the port of New York, certain imported sugar, on which duties amounting to $6,000 had been paid. The sugar was on a lighter, not owned by the United States, and was in possession and control of custom-house officers, not having been delivered to consignees. (R., 4, 12, 13.)

The owners of the lighter paid respondent for the service rendered them. (R., 4.)

Respondent libeled the sugar in the District Court, Eastern District of New York, and was awarded 10 per cent of its value with the duties unpaid. (*Cornell Steamboat Co.* v. *1,883 Bags of Sugar*, 108 Fed., 277.) Respondent contended the duty should be included in estimating the award, but the court held the amount saved the owner was the value of the sugar less the duty, because, if the sugar had been burned, the United States would have been obliged to return the duty paid under section 2984 Revised Statutes.

That decision was acquiesced in, and thereafter this proceeding *in personam* against the United States was

brought in the District Court, Southern District of New York, for the recovery of salvage on the duties—the petition setting forth the facts substantially as above stated.

The United States demurred, alleging (1) the court had no jurisdiction of the alleged cause of action, and (2) the petition did not state facts sufficient to constitute a cause of action. (R., 9.)

The demurrer was overruled (R., 10), answer filed withdrawn, and the cause submitted. (R., 11.)

The court filed a written opinion with a finding of facts and conclusions of law. (R., 12.)

Judgment was rendered for $600—10 per cent of the duties paid. (R., 17.)

The Circuit Court of Appeals affirmed the judgment (R., 24), one judge dissenting. (R., 33.)

ARGUMENT.

I.

Being a Suit Under a Revenue Law, the District Court was Without Jurisdiction.

Jurisdiction is supposed to be conferred by the Tucker Act (act of March 3, 1887, c. 359, 24 Stat., 505), conferring upon the District and Circuit Courts concurrent jurisdiction with the Court of Claims of certain claims against the United States.

But this suit rests upon the alleged obligation of the United States, under section 2984 R. S., to refund duties upon goods destroyed by fire while in the custody of customs officers. It is therefore a suit arising under a revenue law.

In *Nichols* v. *United States* (7 Wall., 122), this court held that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims, those laws constituting a distinct *system* of collection and redress.

The Nichols case was followed in *D. M. Ferry Co.* v. *United States* (85 Fed., 550), Circuit Court of Appeals, Sixth Circuit, opinion by Judge Taft. That was a suit in the Circuit Court under the very statute here relied on, for a refund of duties upon merchandise destroyed by accidental fire. The Treasury Department had refused to refund because at the time of the fire the goods were not in the custody of the customs officers, having been delivered to plaintiff under bond.

After referring to the Nichols case to show that cases arising under the revenue laws are not within the jurisdiction of the Federal courts under the Tucker Act, Judge Taft said (p. 555):

> To avoid the effect of the Nichols case upon the question before us, it is pointed out that in that case the revenue laws themselves provided a remedy by which the taxpayer might bring the Secretary's decision under review in the courts, but that here there is no such provision. This is true, but the Nichols case did not proceed on the ground that there had been an appeal to the courts provided for within the revenue acts themselves; nor was it intimated that a suit in the Court of Claims would have been permitted had no such appeal to the courts been provided. On the contrary, the plain effect of the decision is that if the intention of

> Congress is manifest to create the Secretary of the Treasury a tribunal to decide whether a wrong has been committed under the revenue law, and has made no provision for an appeal, because the revenue law provides a complete system in itself, the presumption must be that it intended to make the decision of the special tribunal thus established final.

Nichols v. *United States* was also followed in—

State Railroad Tax Cases (92 U. S., 614), holding equity courts can not enjoin collection of taxes by Government.

Auffmordt v. *Hedden* (137 U. S., 324), holding appraisement as to dutiable value of goods final, not reexaminable at law.

Treat v. *Staples*, Circuit Court D. Maine, 1870 (1 Holmes 5; 24 Fed. Cas. No. 14,162), holding replevin does not lie to recover vessel seized for taxes by revenue collector.

II.

Import duties are not subject to salvage claims.

Import duties are a burden which goods must bear as a privilege or condition for entering the country. The right of the United States to exact them is not dependent upon the act of the salvor, but arises from the fact that they have actually entered the country, however they may have arrived. Whether brought in by the owner, or entered by the salvor to whom they had been abandoned, the duties must be paid.

It is immaterial that the duties paid might have been recovered by the importer if the goods had been

destroyed. The benefit to the United States would be as great, and the claim for salvage equally strong, if the duties had not been paid. Under section 2984 the Secretary of the Treasury is authorized not only to refund duties paid, in case of the injury or destruction of the goods by accidental fire or other casualty, but to abate those not paid. In either case the act of the salvor works the same advantage to the Government—it enables the collection of duty upon goods which otherwise might not have entered.

Salvage is for benefit, but salving an importation does not benefit the Government. Importation responds to demand, and if one cargo be lost the demand will bring in another, upon which duty must be paid.

The allowance of salvage upon duties lessens the revenue just so much.

The claim of respondents is novel and unprecedented. Question has been made, as it was made by respondents in their action against the sugar, as to whether duties should not be included in estimating the value of the goods salved. Independently of section 2984 it has been held that duties upon wrecked property should be paid out of the gross proceeds before deducting salvage.

Concklin v. *The Harmony*, District Court, D. New York, 1797, 1 Pet. Adm., 34, note; 6 Fed. Cas., No. 3,089.

The Waterloo, Id. 1830, Blatchf. & H., 114; 29 Fed. Cas., No. 17,257.

In *Tucker* v. *The Mary C. Potter*, District Court, D. So. Car. (24 Fed. Cas. 14,223), it was held that, in respect to the lien of salvage, customs duties constituted the prior debt.

In respondent's suit against the sugar the court held the duty "could not properly be the subject of salvage, and its loss, moreover, would have been the loss of the Government, which had no interest in or relation to the property, and could not be made a party, or affected by the salvage award."

Cornell Steamboat Co. v. *1,883 Bags of Sugar*, 108 Fed., 277.

Salvage only arises in respect to *vessels* or their *cargoes.*

Cope v. *Vallette Dry Dock Company*, 119 U. S., 625.

In that case the court said (p. 629):

> If we search through all the books, from the rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued.

Bills of exchange and other evidences of debt or title to property have been held to be excepted from the cargo subject to salvage, because, if sold, no property right could be transferred to the purchaser.

The Emblem, District Court, D. Maine, 1840, 2 Ware, 68; 8 Fed. Cas., No. 4,454.

So salvage can not be awarded for saving the United States mails, because not liable to detention and sale.

> *The Merchant*, District Court, S. D. Florida, 1851, 4 Adm. Rec., 544; 17 Fed. Cas., No. 9,435.

In the cases just referred to something tangible was saved, but it was held from its nature not subject to salvage. In the present case no tangible property was saved to the Government.

The expenses of salvage services are, as a general rule, to be apportioned ratably among the *ship*, *freight*, and *cargo*, according to the principles of general average.

> 24 A. & E. Ency. Law, 2d ed., p. 1219, and cases cited.
>
> Lowndes' Law of General Average, 89.

Parsons in his work on Shipping and Admiralty, vol. 2, p. 302, says:

> Salvage is generally decreed on *all* the property saved, whether *ship*, *cargo*, or *freight*.

Up to the present time nothing else appears to have been thought liable.

The primary action is *in rem* against the thing salved.

In *The Emblem*, above cited, the court said:

> All the authorities speak of the right of the salvor as attaching to the thing, and not as the foundation of any personal claim against the owner, independent of the goods saved. The customs of the sea, as we have them collected in all the old maritime codes, treat the salvor's

> claim in the same way as a right against the property saved, and the usual mode of compensating the service is by the allowance of a certain portion of the goods saved or of their value. The service is nowhere spoken of as constituting the ground of a personal claim against the owners.

The personal action is subsidiary, and only arises where the *res* has been clandestinely removed or destroyed.

In *The Sabine* (101 U. S., 390), the court said:

> Unless the property saved is destroyed after having been restored or is clandestinely removed from the jurisdiction, the salvors require no more convenient or effectual remedy than the action *in rem* against the property, *as their compensation can not exceed its value*, and if destroyed without their fault, or removed from the jurisdiction to defeat their remedy, no doubt is entertained that they may proceed in personam against the *owners* of the salved property, though the case is not specifically provided for in the nineteenth rule.

Here the cargo was not removed or destroyed, hence the proceeding *in rem* against it was respondent's convenient and effectual remedy. Being limited in any event to the value of the *res*, it is immaterial to the Government how that value was determined.

In *The Independence*, Circuit Court, D. Mass., 1855 (2 Curt., 350; 13 Fed. Cas., No. 7,014), Mr. Justice Curtis said:

> I agree also with Judge Ware that the right

of the salvor is merely a right to proceed against the thing saved to obtain his satisfaction, and not a personal claim on the owner, unless he has, by taking possession of the thing saved, thereby rendered himself personally liable for the reward. (*The Emblem*, 2 Ware, 68.) And I do not understand that the nineteenth of the admiralty rules was intended to change this law.

III.

The case is not within Admiralty Rule 19, because the Government did not request the service.

That rule provides:

> Suits for salvage may be *in rem* against the property saved or the proceeds thereof, or *in personam* against the party *at whose request and for whose benefit* the salvage service was performed.

In *The Sabine* (101 U. S., 384, 386) the court said an action *in personam* for salvage services would not lie against consignees to whom the cargo saved had been delivered, because they had not requested the service (p. 387):

> Libellants in a suit for collision may proceed against the ship and master or against the ship alone, or *in personam* against the master or owner alone, but the terms of the nineteenth rule are different, limiting the right of the salvor to a suit *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service was performed.

> Important service, it may be assumed, was rendered by the libellants, but they were neither employed or sent out by the consignees, nor did the consignees request them to go to the assistance or relief of the ship or cargo.

Nor could they sue the owners (p. 389):

> The libellants insist that the form of the libel may be supported under the last clause of the rule, which gives the right to an action *in personam* against the party at whose request and for whose benefit the salvage service was performed, and their argument is that the service in the case resulted in a benefit to the owners of the cargo; but the case fails to show that the owners of the cargo ever requested the service, and it is clear that they are not joined in the libel. They, the libellants, must show the request and the benefit, and unless they show that both concur they can not make out a case, even within their own theory.

See Henry on Admiralty Jurisdiction and Procedure, sec. 116, pp. 323–4, commenting on this decision.

In respondent's action against the sugar, the court said (*Cornell Steamboat Co.* v. *1,883 Bags of Sugar*, 108 Fed., 278):

> But under the fourteenth [nineteenth] admiralty rule the United States could not be a party to this suit. It could not be a claimant. It had no relation to the *res* that enabled it to become either a respondent or a claimant, and is indifferent whether an award be granted or withheld.

That a libel *in rem* against the goods salved can

not affect the right of the Government to collect or retain the duties thereon seems conclusive that it has no such interest in the goods as subjects it to a suit *in personam*.

The English cases upon which the Circuit Court of Appeals relied are not in point, for in both the parties sued had such an interest in the thing saved as entitled them to become claimants.

Five Steel Barges, 8 Prob. Div., 142.
The Port Victor, 9 Asp. Mar. Law Cas., N. S., 163.

IV.

Under section 2984 R. S. the courts can not determine in advance of decision by the Secretary of the Treasury, and upon a hypothetical case merely, that duties should be refunded.

In *D. M. Ferry Co.* v. *United States* (85 Fed., 551), the Circuit Court of Appeals for the Sixth Circuit, held that section 2984 made the Secretary the final and exclusive judge of claims for refundment of duties.

The power of Congress to intrust to a special tribunal, or to an administrative officer, final decision of questions of this sort can not be doubted.

Murray's Lessee v. *Hoboken Land & Imp. Co.*, 18 How., 272.
Hilton v. *Merritt, Collector*, 110 U. S., 97.
Hadden v. *Merritt*, 115 U. S., 25.
Bushnell v. *Leland*, 164 U. S., 684.
Gardner v. *Bonestell*, 180 U. S., 369.
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Obviously, if the courts may not review the decision of the Secretary rendered pursuant to section 2984

upon an *actual* case, they have no authority, in advance of a decision by him, and upon a *hypothetical* case merely, to say that the Government would have been obliged to refund.

But even if the decision of the Secretary, under section 2984, were reviewable by the courts, that fact would itself be an argument against a determination in advance. Upon no ground, however, can the action of the courts in passing upon a hypothetical case be justified.

The Circuit Court of Appeals held that section 2984 was mandatory. But that is immaterial, since no case requiring action by the Secretary ever arose. And the fact that the duty of the Secretary to act is mandatory does not authorize the courts to act for him.

It is said the demurrer admits that the goods would have been destroyed but for the salvors. But it was neither alleged nor conceded, since the fact was otherwise, that the goods had been destroyed and proof to that effect satisfactory to the Secretary had been made, as the statute requires. Besides, the petition merely states that the sugar "was in danger of being destroyed by fire" and was saved "from destruction by said fire," whereas section 2984 refers only to "*accidental* fire," and there was no proof that the fire was accidental.

Because of the importance of the questions involved and the manifest error committed, the writ prayed should issue.

HENRY M. HOYT,
Solicitor-General.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
THE CORNELL STEAMBOAT COMPANY, RESPONDENT.
No. ——.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT, AND BRIEF.

The Solicitor-General, on behalf of the United States, respectfully prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit in the above-entitled case affirming that of the District Court for the Southern District of New York awarding respondent, as salvage, 10 per cent of the duties paid upon a cargo of sugar alleged to have been saved by it from destruction by fire.

The judgment below was based upon the theory that if the sugar had been destroyed the United States would have been obliged to refund the duties under section 2984 Revised Statutes, which provides:

> SEC. 2984. The Secretary of the Treasury is hereby *authorized*, upon production of satisfactory proof *to him* of the actual [industry] [injury] or destruction, in whole or in part, of any merchandise, by *accidental fire*, or other casualty,

while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs, *to abate or refund*, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon, and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be.

The case presents several questions of special importance.

1. Have Federal courts jurisdiction under the Tucker Act of a suit like this against the Government arising under the revenue laws?

2. Are import duties subject to salvage claims?

3. Under Admiralty rule 19, will a salvage suit *in personam* lie against the Government for saving duties when it did not request the service?

4. Under section 2984 R. S., may the courts, in advance of a decision by the Secretary of the Treasury, and upon a hypothetical case, determine that a refund must have been made if the goods had been destroyed?

This suit is an invasion of the revenue system. The attack upon import duties is novel and unprecedented. Admiralty rule 19 has been entirely ignored. The application of section 2985 Revised Statutes is unwarranted, and may subject the Government to no end of claims and litigation in the courts. Substantial grounds for issuing the writ of certiorari are therefore presented.

STATEMENT OF CASE.

In January, 1901, a tug belonging to respondent is alleged to have saved from destruction by fire, in the port of New York, certain imported sugar, on which duties amounting to $6,000 had been paid. The sugar was on a lighter, not owned by the United States, and was in possession and control of custom-house officers, not having been delivered to consignees. (R., 4, 12, 13.)

The owners of the lighter paid respondent for the service rendered them. (R., 4.)

Respondent libeled the sugar in the District Court, Eastern District of New York, and was awarded 10 per cent of its value with the duties unpaid. (*Cornell Steamboat Co.* v. *1,883 Bags of Sugar*, 108 Fed., 277.) Respondent contended the duty should be included in estimating the award, but the court held the amount saved the owner was the value of the sugar less the duty, because, if the sugar had been burned, the United States would have been obliged to return the duty paid under section 2984 Revised Statutes.

That decision was acquiesced in, and thereafter this proceeding *in personam* against the United States was

brought in the District Court, Southern District of New York, for the recovery of salvage on the duties—the petition setting forth the facts substantially as above stated.

The United States demurred, alleging (1) the court had no jurisdiction of the alleged cause of action, and (2) the petition did not state facts sufficient to constitute a cause of action. (R., 9.)

The demurrer was overruled (R., 10), answer filed withdrawn, and the cause submitted. (R., 11.)

The court filed a written opinion with a finding of facts and conclusions of law. (R., 12.)

Judgment was rendered for $600—10 per cent of the duties paid. (R., 17.)

The Circuit Court of Appeals affirmed the judgment (R., 24), one judge dissenting. (R., 33.)

ARGUMENT.

I.

Being a Suit Under a Revenue Law, the District Court was Without Jurisdiction.

Jurisdiction is supposed to be conferred by the Tucker Act (act of March 3, 1887, c. 359, 24 Stat., 505), conferring upon the District and Circuit Courts concurrent jurisdiction with the Court of Claims of certain claims against the United States.

But this suit rests upon the alleged obligation of the United States, under section 2984 R. S., to refund duties upon goods destroyed by fire while in the custody of customs officers. It is therefore a suit arising under a revenue law.

In *Nichols* v. *United States* (7 Wall., 122), this court held that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims, those laws constituting a distinct *system* of collection and redress.

The Nichols case was followed in *D. M. Ferry Co.* v. *United States* (85 Fed., 550), Circuit Court of Appeals, Sixth Circuit, opinion by Judge Taft. That was a suit in the Circuit Court under the very statute here relied on, for a refund of duties upon merchandise destroyed by accidental fire. The Treasury Department had refused to refund because at the time of the fire the goods were not in the custody of the customs officers, having been delivered to plaintiff under bond.

After referring to the Nichols case to show that cases arising under the revenue laws are not within the jurisdiction of the Federal courts under the Tucker Act, Judge Taft said (p. 555):

> To avoid the effect of the Nichols case upon the question before us, it is pointed out that in that case the revenue laws themselves provided a remedy by which the taxpayer might bring the Secretary's decision under review in the courts, but that here there is no such provision. This is true, but the Nichols case did not proceed on the ground that there had been an appeal to the courts provided for within the revenue acts themselves; nor was it intimated that a suit in the Court of Claims would have been permitted had no such appeal to the courts been provided. On the contrary, the plain effect of the decision is that if the intention of

> Congress is manifest to create the Secretary of the Treasury a tribunal to decide whether a wrong has been committed under the revenue law, and has made no provision for an appeal, because the revenue law provides a complete system in itself, the presumption must be that it intended to make the decision of the special tribunal thus established final.

Nichols v. *United States* was also followed in—

State Railroad Tax Cases (92 U. S., 614), holding equity courts can not enjoin collection of taxes by Government.

Auffmordt v. *Hedden* (137 U. S., 324), holding appraisement as to dutiable value of goods final, not reexaminable at law.

Treat v. *Staples*, Circuit Court D. Maine, 1870 (1 Holmes 5; 24 Fed. Cas. No. 14,162), holding replevin does not lie to recover vessel seized for taxes by revenue collector.

II.

Import duties are not subject to salvage claims.

Import duties are a burden which goods must bear as a privilege or condition for entering the country. The right of the United States to exact them is not dependent upon the act of the salvor, but arises from the fact that they have actually entered the country, however they may have arrived. Whether brought in by the owner, or entered by the salvor to whom they had been abandoned, the duties must be paid.

It is immaterial that the duties paid might have been recovered by the importer if the goods had been

destroyed. The benefit to the United States would be as great, and the claim for salvage equally strong, if the duties had not been paid. Under section 2984 the Secretary of the Treasury is authorized not only to refund duties paid, in case of the injury or destruction of the goods by accidental fire or other casualty, but to abate those not paid. In either case the act of the salvor works the same advantage to the Government—it enables the collection of duty upon goods which otherwise might not have entered.

Salvage is for benefit, but salving an importation does not benefit the Government. Importation responds to demand, and if one cargo be lost the demand will bring in another, upon which duty must be paid

The allowance of salvage upon duties lessens the revenue just so much.

The claim of respondents is novel and unprecedented. Question has been made, as it was made by respondents in their action against the sugar, as to whether duties should not be included in estimating the value of the goods salved. Independently of section 2984 it has been held that duties upon wrecked property should be paid out of the gross proceeds before deducting salvage.

Concklin v. *The Harmony*, District Court, D. New York, 1797, 1 Pet. Adm., 34, note; 6 Fed. Cas., No. 3,089.

The Waterloo, Id. 1830, Blatchf. & H., 114; 29 Fed. Cas., No. 17,257.

In *Tucker* v. *The Mary C. Potter*, District Court, D. So. Car. (24 Fed. Cas. 14,223), it was held that, in respect to the lien of salvage, customs duties constituted the prior debt.

In respondent's suit against the sugar the court held the duty "could not properly be the subject of salvage, and its loss, moreover, would have been the loss of the Government, which had no interest in or relation to the property, and could not be made a party, or affected by the salvage award."

> *Cornell Steamboat Co.* v. *1,883 Bags of Sugar*, 108 Fed., 277.

Salvage only arises in respect to *vessels* or their *cargoes.*

> *Cope* v. *Vallette Dry Dock Company*, 119 U. S., 625.

In that case the court said (p. 629):

> If we search through all the books, from the rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued.

Bills of exchange and other evidences of debt or title to property have been held to be excepted from the cargo subject to salvage, because, if sold, no property right could be transferred to the purchaser.

> *The Emblem*, District Court, D. Maine, 1840, 2 Ware, 68; 8 Fed. Cas., No. 4,454.

So salvage can not be awarded for saving the United States mails, because not liable to detention and sale.

> *The Merchant*, District Court, S. D. Florida, 1851, 4 Adm. Rec., 544; 17 Fed. Cas., No. 9,435.

In the cases just referred to something tangible was saved, but it was held from its nature not subject to salvage. In the present case no tangible property was saved to the Government.

The expenses of salvage services are, as a general rule, to be apportioned ratably among the *ship*, *freight*, and *cargo*, according to the principles of general average.

> 24 A. & E. Ency. Law, 2d ed., p. 1219, and cases cited.
>
> Lowndes' Law of General Average, 89.

Parsons in his work on Shipping and Admiralty, vol. 2, p. 302, says:

> Salvage is generally decreed on *all* the property saved, whether *ship*, *cargo*, or *freight*.

Up to the present time nothing else appears to have been thought liable.

The primary action is *in rem* against the thing salved.

In *The Emblem*, above cited, the court said:

> All the authorities speak of the right of the salvor as attaching to the thing, and not as the foundation of any personal claim against the owner, independent of the goods saved. The customs of the sea, as we have them collected in all the old maritime codes, treat the salvor's

> claim in the same way as a right against the property saved, and the usual mode of compensating the service is by the allowance of a certain portion of the goods saved or of their value. The service is nowhere spoken of as constituting the ground of a personal claim against the owners.

The personal action is subsidiary, and only arises where the *res* has been clandestinely removed or destroyed.

In *The Sabine* (101 U. S., 390), the court said:

> Unless the property saved is destroyed after having been restored or is clandestinely removed from the jurisdiction, the salvors require no more convenient or effectual remedy than the action *in rem* against the property, *as their compensation can not exceed its value*, and if destroyed without their fault, or removed from the jurisdiction to defeat their remedy, no doubt is entertained that they may proceed in personam against the *owners* of the salved property, though the case is not specifically provided for in the nineteenth rule.

Here the cargo was not removed or destroyed, hence the proceeding *in rem* against it was respondent's convenient and effectual remedy. Being limited in any event to the value of the *res*, it is immaterial to the Government how that value was determined.

In *The Independence*, Circuit Court, D. Mass., 1855 (2 Curt., 350; 13 Fed. Cas., No. 7,014), Mr. Justice Curtis said:

> I agree also with Judge Ware that the right

of the salvor is merely a right to proceed against the thing saved to obtain his satisfaction, and not a personal claim on the owner, unless he has, by taking possession of the thing saved, thereby rendered himself personally liable for the reward. (*The Emblem*, 2 Ware, 68.) And I do not understand that the nineteenth of the admiralty rules was intended to change this law.

III.

The case is not within Admiralty Rule 19, because the Government did not request the service.

That rule provides:

> Suits for salvage may be *in rem* against the property saved or the proceeds thereof, or *in personam* against the party *at whose request and for whose benefit* the salvage service was performed.

In *The Sabine* (101 U. S., 384, 386) the court said an action *in personam* for salvage services would not lie against consignees to whom the cargo saved had been delivered, because they had not requested the service (p. 387):

> Libellants in a suit for collision may proceed against the ship and master or against the ship alone, or *in personam* against the master or owner alone, but the terms of the nineteenth rule are different, limiting the right of the salvor to a suit *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service was performed.

> Important service, it may be assumed, was rendered by the libellants, but they were neither employed or sent out by the consignees, nor did the consignees request them to go to the assistance or relief of the ship or cargo.

Nor could they sue the owners (p. 389):

> The libellants insist that the form of the libel may be supported under the last clause of the rule, which gives the right to an action *in personam* against the party at whose request and for whose benefit the salvage service was performed, and their argument is that the service in the case resulted in a benefit to the owners of the cargo; but the case fails to show that the owners of the cargo ever requested the service, and it is clear that they are not joined in the libel. They, the libellants, must show the request and the benefit, and unless they show that both concur they can not make out a case, even within their own theory.

See Henry on Admiralty Jurisdiction and Procedure, sec. 116, pp. 323–4, commenting on this decision.

In respondent's action against the sugar, the court said (*Cornell Steamboat Co.* v. *1,883 Bags of Sugar*, 108 Fed., 278):

> But under the fourteenth [nineteenth] admiralty rule the United States could not be a party to this suit. It could not be a claimant. It had no relation to the *res* that enabled it to become either a respondent or a claimant, and is indifferent whether an award be granted or withheld.

That a libel *in rem* against the goods salved can

not affect the right of the Government to collect or retain the duties thereon seems conclusive that it has no such interest in the goods as subjects it to a suit *in personam*.

The English cases upon which the Circuit Court of Appeals relied are not in point, for in both the parties sued had such an interest in the thing saved as entitled them to become claimants.

Five Steel Barges, 8 Prob. Div., 142.
The Port Victor, 9 Asp. Mar. Law Cas., N. S., 163.

IV.

Under section 2984 R. S. the courts can not determine in advance of decision by the Secretary of the Treasury, and upon a hypothetical case merely, that duties should be refunded.

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upon an *actual* case, they have no authority, in advance of a decision by him, and upon a *hypothetical* case merely, to say that the Government would have been obliged to refund.

But even if the decision of the Secretary, under section 2984, were reviewable by the courts, that fact would itself be an argument against a determination in advance. Upon no ground, however, can the action of the courts in passing upon a hypothetical case be justified.

The Circuit Court of Appeals held that section 2984 was mandatory. But that is immaterial, since no case requiring action by the Secretary ever arose. And the fact that the duty of the Secretary to act is mandatory does not authorize the courts to act for him.

It is said the demurrer admits that the goods would have been destroyed but for the salvors. But it was neither alleged nor conceded, since the fact was otherwise, that the goods had been destroyed and proof to that effect satisfactory to the Secretary had been made, as the statute requires. Besides, the petition merely states that the sugar "was in danger of being destroyed by fire" and was saved "from destruction by said fire," whereas section 2984 refers only to "*accidental* fire," and there was no proof that the fire was accidental.

Because of the importance of the questions involved and the manifest error committed, the writ prayed should issue.

HENRY M. HOYT,
Solicitor-General.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, PETITIONER,
v.
THE CORNELL STEAMBOAT COMPANY,
Respondent.
No. 239.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a proceeding against the United States begun in the District Court for the Southern District of New York and alleged to be permitted by the act of March 3, 1887, chapter 359—the Tucker Act—(24 Stat., 505) to recover for services rendered in saving a cargo of sugar, upon which duties amounting to $6,000 had been paid, from destruction by fire. In substance the petition alleged (R., 2)—

That in January, 1901, the lighter *Bangor*, having on board 1,883 bags of sugar, while in the port of New York was in danger of being destroyed by fire and was saved by petitioner's tug;

That the sugar was subject to duty and at the time of the fire was in possession and under control of custom-house officers;

That petitioner filed a libel in the District Court of the United States against the cargo to recover compensation for the salvage services and was awarded 10 per cent of the value of the property saved—with duties unpaid; and the court held that as it appeared the duties had been paid provisionally and in such wise that if the merchandise had been destroyed by fire the owners could have claimed repayment, the recovery should be estimated upon their value without considering such duties;

That by reason of the services rendered the $6,000 collected by the Government was saved, and petitioner is entitled to have and claim against the United States by reason of said services and said decree the sum of $600 "inasmuch as the said duties in possession of the United States were entirely saved to the United States by the services of the petitioner as above stated."

A demurrer suggesting the want of jurisdiction and that the facts stated no cause of action was overruled (R., 4, 5).

The court entered of record its findings and conclusions (R., 6, 8), and directed judgment for $600 (R., 8).

The Circuit Court of Appeals affirmed the action of the District Court (R., 17, 18), and the cause was brought here by certiorari.

STATUTES.

The Tucker Act of March 3, 1887, chapter 359, (24 Stat., 505) provides—

> That the Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *
>
> SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

Revised Statutes, section 2984.

> The Secretary of the Treasury is hereby authorized, upon production of satisfactory

proof to him of the actual injury or destruction, in whole or in part, of any merchandise, by accidental fire, or other casualty, while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon; and likewise to cancel any warehouse bond or bonds or enter satisfaction thereon in whole or in part, as the case may be.

Revised Statutes, section 3689.

There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same, respectively, and such appropriations shall be deemed permanent annual appropriations.

Admiralty Rule 19.

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

ARGUMENT.

I.

The District Court had no jurisdiction.

Every Government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted it is only on such terms and conditions as are prescribed. The principle is fundamental, applies to every sovereign power, and but for such protection the Government would be unable to perform the various duties for which it was created. To collect revenue for its support would be impossible without infinite embarrassments and delays if it was subject to civil process the same as a private person. (*Nichols* v. *United States*, 7 Wall., 122, 126.)

The doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of Congress expressly authorizing it to be done. (*The Davis*, 10 Wall., 15, 19.)

(a)

Unless granted by the Tucker Act the trial court was without authority to afford relief.

That statute in effect waives the exemption of the Government from suits in certain specified matters—viz, claims founded upon the Constitution or laws of the United States, regulations of an Executive Department, contracts, expressed or implied, with the Government, or for damages in cases not sounding in tort, in respect of which claims the party would be

entitled to redress against the United States in a court of law, equity, or admiralty if they were suable.

Obviously the present controversy, if provided for at all, must be one arising out of contract, expressed or implied, or from damages, in respect of which respondent would be entitled to redress against the United States in a court of law, equity, or admiralty if suable as a private individual.

There was no contract, expressed or implied, between the Government and the respondent and no such thing is alleged in the petition. The services to the cargo were purely voluntary, and although they may have been beneficial that is not sufficient to establish a contract. They were sufficient in maritime law to create a lien against the cargo, enforceable in a proceeding *in rem*—the full and only measure of relief to which respondent was entitled. The provision of the statute relating to contracts does not apply.

The claim is not one in respect of which respondent would be entitled to redress in a court of law, equity, or admiralty against a private individual.

No recovery, either at law or in equity, is possible for purely voluntary services.

A proceeding in admiralty *in personam* against a private individual for salvage allowance is not permissible unless the service was performed "at his request and for his benefit," or unless in some way a proceeding *in rem.* against the thing salved has become impossible—as, e. g., by clandestine removal or destruction after delivery to the owner. Benefit, however

great, from salving a cargo can not support a claim *in personam* for the services rendered. (Admiralty Rule 19; *The Sabine*, 101 U. S., 384, 389.)

It follows that if the Government were subject to suit as an individual, respondent's claim for saving the cargo in question could not be enforced by a proceeding *in personam* against it.

(b)

Section 2984, Revised Statutes, specifies the sole method assented to by the Government for securing refund of duties paid upon merchandise afterwards destroyed. The matter must be presented to the Secretary of the Treasury, and he alone is authorized to direct payment "upon production of satisfactory proof to him of the actual injury or destruction, in whole or in part, of any merchandise by accidental fire, or other casualty, etc." The courts have no jurisdiction of an original proceeding to enforce such a claim—whatever might be their power in a case where the Secretary should refuse to perform his duty.

If the cargo of sugar had been actually destroyed the court certainly would have had no jurisdiction of any action to recover the duties paid, unless and until application had been first made to the Secretary and adequate proof presented to him showing loss by accident. He is the special tribunal to which that matter must be first submitted. It is unnecessary now to discuss the power of the courts to superintend his action.

As the party who paid the duties could not, ignoring the Secretary, maintain an original proceeding in court

to secure repayment, it appears manifest, in the absence of clear and specific authorization, that the court has no jurisdiction of a like proceeding to enforce a demand for compensation in behalf of one who claims to have prevented the necessity of repayment.

There is no warrant for the judgment against the United States for services rendered in saving something owned by another, the actual destruction of which would not have imposed on them a liability enforceable in court.

(c)

The claim set up in the present proceeding must be regarded as under the revenue laws. Such claims are not within the jurisdiction of the courts, since those laws constitute a distinct and exclusive system of collection and redress.

In *Nichols* v. *United States* (7 Wall., 122, 131), this court said: "We are satisfied that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims."

In *D. M. Ferry & Co.* v. *The United States* (85 Fed., 550), the Circuit Court of Appeals for the Sixth Circuit, following the Nichols case, denied the jurisdiction of the court to entertain a petition asking judgment for duties paid upon articles destroyed by fire, the right thereto being asserted under section 2984, Revised Statutes. Among other things it said (p. 555):

> To avoid the effect of the Nichols case upon the question before us, it is pointed out that in

that case the revenue laws themselves provided a remedy by which the taxpayer might bring the Secretary's decision under review in the courts, but that here there is no such provision. This is true, but the Nichols case did not proceed on the ground that there had been an appeal to the courts provided for within the revenue acts themselves; nor was it intimated that a suit in the Court of Claims would have been permitted had no such appeal to the courts been provided. On the contrary, the plain effect of the decision is that if the intention of Congress is manifest to create the Secretary of the Treasury a tribunal to decide whether a wrong has been committed under the revenue law, and has made no provision for an appeal, because the revenue law provides a complete system within itself, the presumption must be that it was intended to make the decision of the special tribunal thus established final.

See also

State Railroad Tax Cases, 92 U. S., 614.
Auffmordt v. *Hedden*, 137 U. S., 324.
Treat v. *Staples*, Cir. Ct. Dist. of Maine, 1870, 1 Holmes 5; 24 Fed. Cases, 14162.

II.

Upon the facts, respondent's claim is without merit.

What respondent did was purely voluntary and such services, however meritorious or beneficial, create no obligation enforceable against the beneficiary either in law or equity.

The general principle is, beyond all question, that work and labor done or expended by one man to preserve or to benefit the property of another do not, according to English law, create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more that you can confer a benefit upon a man against his will. The maritime law, for the purposes of public policy, and for the advantage of trade and commerce, imposes in cases of salvage a *jus in re*, a liability upon the thing saved—a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of the sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances.

Kennedy on Civil Slavage, 6.

Falcke v. *Scottish Imperial Ins. Co.*, 34 Ch. Div., 234, 248.

The Blaireau, 2 Cranch, 240, 265.

The Emblem, 8 Fed. Cas., 4434.

Did any liability arise according to the rules of maritime law?

In his brief opposing the application for certiorari counsel for respondent said of this cause, "It is a suit in admiralty to recover salvage on an implied contract in accordance with the decision in the case of *The Monarch*." And unless under the rules governing salvage claims liability for the alleged service arose no judgment therefor can be rightly given.

The duties having been paid, the Government had no lien upon or title to or property interest in the merchandise.

Respondent says in effect that if the cargo had not been saved the Government would have been compelled to return the tariff charges collected upon it. Manifestly, respondent extended no aid to and had no possession of anything belonging to the United States. At most, its efforts prevented the accruing of a money demand, and in that particular were beneficial.

In a sense, the Government may be said to receive benefit whenever a cargo is salved, brought into port, and duties collected—the payment would not have been made if the salving had not occurred; and a certain benefit follows the importation of every dutiable article. But no one could imagine that a suit would lie to recover in either of those cases.

Benefit alone from the salving of a cargo is not sufficient to render the beneficiary liable to a judgment for compensation in an action *in personam*. One whose life is saved from the sea in law owes nothing therefor; no insurer of goods salved, nor one who holds a respondentia bond thereon, nor a seaman whose wages are preserved can be directly proceeded against for the services; and the owner of property rescued is under no personal obligation to pay compensation.

Salvage is eminently a subject for admiralty jurisdiction, and it has been decided that no action will lie at common law unless the salvor can prove a contract

with the owner of the property saved or with his agent. (2 Parsons on Shipping and Admiralty, 260.)

It must be obvious and certain that the master's reluctance or resistance to the saving of the property under his charge should not bar claims of salvors, but rather enhance them, if their services were necessary or in all respects meritorious and useful. (Ib., 264.)

The rule of rewarding salvors is grounded on policy. It is desirable to encourage those who chance to be in a position to help vessels in distress to use their best exertions, to risk if necessary their own lives and property, and to delay their adventures for that purpose. The prospect of reward, which is generally assessed liberally, brings out a readiness and strenuousness which can not always be expected without that motive, and both lives and property at sea are thus made more safe. (Carver's Carriage by Sea, 3d ed., sec. 323.)

If we search through all the books, from the rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued. (*Cope* v. *Vallette Dry Dock Company*, 119 U. S., 625.)

The right does not arise on saving property of other kinds which may have been moored afloat, and have got adrift, such as a raft of timber, a buoy, or a floating dry dock. (Carver's Carriage by Sea, 3d ed., sec. 322.)

The foundation of the admiralty jurisdiction in the awarding of salvage is the power of enforcing the maritime lien obtained on property saved by salvors. (*The Cargo Ex. Schiller*, 2 L. R., P. D., 145, 149.)

In *The Emblem*, District Court, D. Maine, 1840 (8 Fed. Cas., No. 4434), the court said:

> All the authorities speak of the right of the salvor as attaching to the thing, and not as the foundation of any personal claim against the owner, independent of the goods saved. The customs of the sea, as we have them collected in all the old maritime codes, treat the salvor's claim in the same way as a right against the property saved, and the usual mode of compensating the service is by the allowance of a certain portion of the goods saved or of their value. The service is nowhere spoken of as constituting the ground of a personal claim against the owners.

The Independence, Cir. Ct. Mass., 1855; 13 Fed. Cas., 7014.

In *The Sabine* (101 U. S., 384) this court declared that under the nineteenth admiralty rule an action *in personam* for salving services could not be sustained unless they were at the request and for the benefit of the defendant, or at least in those cases where the property had been destroyed or removed after having been restored.

Salving charges can not be enforced for rescuing bills of exchange and other evidences of debt. (*The Emblem*, 8 Fed. Cas., No. 4434.)

Salvage can not be awarded for saving the United States mails because not subject to detention and sale. (*The Merchant*, 17 Fed. Cas., No. 9435.)

III.

The authorities relied upon for the respondent.

In the opinion of the Circuit Court of Appeals (R., 14), *Supervisors* v. *United States* (4 Wall., 435), and other cases are cited as authority for the contention that under section 2984, Revised Statutes, the Secretary of the Treasury was not vested with arbitrary discretion as to the return of customs duties in cases where the merchandise has been accidentally destroyed by fire or other casualty.

It is unnecessary to discuss here the power of the court by mandamus to compel the Secretary of the Treasury to do what he ought to do. For this argument that may be admitted. But when Congress has prescribed a particular mode according to which one who seeks a return of duties must proceed he can not be permitted to ignore the prescribed tribunal and resort in the first instance to the courts.

United States v. *Morgan* (99 Fed., 570).

This was a proceeding under the Tucker Act to recover compensation from the Government for saving a light-ship, in which relief was granted.

A ship actually saved remained in the possession of its owner. If the rescued vessel had belonged to an individual, the salvors would have been entitled

to their reward and could have enforced it either by an action *in rem* or, if deprived of the lien, by an action *in personam*. The vessel could not be withheld, and the Government by retaining it deprived the salvor of his lien. Under such circumstances I submit a proceeding *in personam* against an individual owner would have been proper.

The Morgan case does not support the radically different contention here advanced.

Five Steel Barges, 15 L. R., P. D. (1890), 142.

The Port Victor, Aspinall's Maritime Cases (1901), 163.

In *Five Steel Barges* vessels constructed by defendants under contract with the Government were to be delivered within twelve months, and the purchase money, except one installment, had been paid at the time of the salvage. After they were delivered to the Government an action *in personam* was brought against the builders. The court held the defendants had a substantial interest to the full value of the barges at the time of the services and that the action would lie.

By the acts of Parliament of 1854, 1861, and 1862 the right to proceed *in personam* in courts of admiralty was enlarged, and these acts must be considered in connection with the opinion.

The act of 1854 provided:

> That in all cases in which a party had a cause or right of action in the Court of Admiralty against any ship, or freight, goods, or

> other effects whatever, it should not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof, but it should be competent to him to proceed by way of personal action, citing the owner or owners of such ship, freight, goods, or other effects to appear and defend the suit.

The circumstances in *Five Steel Barges* were exceptional, and the holding ought not to be followed where the facts are entirely different.

> Kennedy on Civil Salvage, 12.
> Carver on Carriage by Sea, § 324 a.
> Williams and Bruce on Admiralty, 321.

In *The Port Victor* the court distinguished the interests of the defendant from that of a mortgagee or insurer or the lender upon a bottomry or respondentia bond, but approved the doctrine announced in the *Five Steel Barges*.

The English courts were, of course, proceeding in view of the statutes above cited and were not constrained by any legislation similar to our nineteenth admiralty rule. Whatever may be said touching the soundness of the doctrine announced in that country, it appears directly in conflict with Rule 19 and the opinion of this court in *The Sabine* (101 U. S., 390).

IV.

The respondent freely asserted its rights by a proceeding in rem against the cargo, and has had all the relief to which it was entitled.

In *Cornell Steamboat Co.* v. *1,883 Bags of Sugar* (108 Fed., 277) respondent sought to recover by a proceeding *in rem* compensation for the salvage services based upon the value of the sugar with duties paid. The court, in fixing the amount for which judgment should be given, refused to consider the $6,000 paid for duties, and no appeal was taken.

If the duties had been included in estimating the value of the salved cargo, manifestly this action against the Government would not lie; and I submit no liability can properly arise because of the decision in that proceeding. The action *in rem* against the goods themselves was the proper, appropriate method for securing relief, and if the respondent failed to obtain satisfactory compensation the Government can not be called upon to make good the deficit. The remedy, if any, was by appeal.

I respectfully ask that the judgment of the court below be reversed.

J. C. McReynolds,
Assistant Attorney-General.

April, 1906.

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Supreme Court of the United States.

Office Supreme Court U. S.
FILED
APR 24 1905
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1904.

THE UNITED STATES,
Petitioner,

vs.

THE CORNELL STEAMBOAT CO.,
Respondent.

No. 624. 239.

Brief in Opposition to Application for Writ of Certiorari.

The Respondent respectfully represents to this Court, that no writ of certiorari should be granted here, and presents the following considerations in answer to the Petition of the United States.

FIRST POINT.

The case came before the United States District Court on a demurrer to the Petition. The demurrer admitted the allegations of the petition, and the allegation was therefore admitted that the cargo of sugar in question "had been saved from destruction by fire" by the respondents ing; that "the duties on the sugar had been paid to the Government provisionally and in such wise that if the sugar had been destroyed by said fire the owners of said sugar would have been entitled to claim a repayment to them of the amount of the duties."

These facts being admitted, the United States ought not to be heard to argue against them. And this Court ought not to call up this case in order

to hear the United States argue that the facts are otherwise, which seems to be the substance of the present brief for the United States.

SECOND POINT.

These facts being admitted, the services of the respondent's tug saved to the United States $6,000. There is no equity in the refusal of the United States to pay salvage for that saving. It is not fair for the United States to refuse to pay for that service. The Circuit Court of Appeals has so decided. And this Court ought not to assist the United States in its effort to avoid doing what is fair.

THIRD POINT.

The brief on page 2 states that the case presents several questions of special importance. We deny that those questions as stated are in the case.

(1) This suit does not "arise under the Revenue Laws." It is a suit in Admiralty to recover salvage on an implied contract in accordance with the decision in the case of the Monarch.

(2) There is no question here as to "import duties being subject (in rem) to salvage claims." The question is whether the United States, whose right to righteously hold the $6,000 of duties has been saved to it, ought *ex aequo et bono* to pay a reasonable remuneration for such services.

(3) There is no question here of the applicability of Admiralty Rule 19. The Statute in question, the Tucker Act, gives the District Court jurisdiction over the contract in this case.

(4) This case is not "a hypothetical case." It is a case in which all the facts are admitted.

FOURTH POINT.

The quotation on p. 8 of the brief for the United States, purporting to be a quotation from the decision of the Court in the "respondent's suit against the sugar" is a misquotation. No such language is to be found in the opinion.

But that the loss of the duty by the destruction of the sugar "would have been the loss of the Government" is quite correct. That is the very ground on which it is held to be right for the Government to pay a compensation for saving it from that loss.

It is correct to say that the Government "could not be made a party to the suit" against the sugar, but it is not correct to say that it "had no interest in or relation to the property." It had such an interest in and relation to it, that the destruction of the sugar would have caused a loss of $6,000 to the Government—exactly such an interest as was held by the Admiralty Courts of England in the cases of "The Five Steel Barges" (15 P. D. Rep. 142, and "The Port Victor" (Aspinall's Maritime Law Cases, vol. 9, pp. 163 and 182), to make a claim to compensation, on the saving of the property, a righteous and just claim.

We respectfully request the Court to examine those cases. They will, we are sure, commend themselves to the good sense and sense of justice of this Court.

FIFTH POINT.

The question of the jurisdiction of the Court has been sustained by two Circuit Courts of Appeal, the case of the Monarch, 99 F. R., 570 and the present case. We respectfully request the

Court to carefully look at the opinion of the Court in the case of the Monarch, for we are sure that its reasoning and conclusion will commend itself to the judgment of this Court.

The decision in the case of the Monarch is ample to sustain the liability upon the United States to pay compensation for those services. As the Court said in that case: "The essence of the pleading is the petition to be awarded compensation for valuable and highly meritorious services rendered the Government in saving its property in maritime peril." That is exactly this case, except that the question here is whether the Government had such an interest in the property as to fairly make it liable to pay. The decisions in the English cases above referred to are abundant to show that this interest which the Government had in the property *by reason of its lien upon the property for the duties*, is abundant to sustain the claim.

SIXTH POINT.

It is claimed that even if the facts were as stated, yet the Secretary of the Treasury had the power to refuse the repayment of the duty, even though the facts were such as to make his refusal an arbitrary and wrongful act.

In other words, the proposition is that the Secretary of the Treasury had the power to do an unjust and unrighteous action, and that, because he had that power, it cannot be argued that he would be called upon to do the act which was right and just. That is certainly not a proposition which should commend itself to this Court.

On the contrary, as this Court said in the case of Gibbons v. The United States, 8 Wall 269: "The

supposition that the Government will not do justice is not to be indulged." Nor should the supposition that the Secretary of the Treasury would not do justice be indulged.

SEVENTH POINT.

The opinion of the Circuit Court of Appeals in this case is well considered. It supports its conclusion that the Secretary would, on the facts here admitted, be required to refund these duties by the authorities and decisions of this Court, to which we refer.

In the case of the Supervisors v. The United States, 4 Wall, 435, 446, this Court, in giving construction to a similar statute, used the following language:

"The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the Act before us, or in equivalent language" (and it cannot be argued that the language of this statute is not equivalent language), "whenever the public interest or individual rights call for its exercise, the language used, though permissive in form is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given not for their benefit, but for his. It is placed with the depository to meet the demands of right and to prevent a failure of justice."

The argument in this case for the petition is that the demands of right shall not be listened to, and that justice shall fail. But we submit that no such conclusion can be properly adopted by this Court.

EIGHTH POINT.

We submit that the opinion of the Circuit Court of Appeals in this case is well reasoned, is consonant to law and justice; that respondent's claim in this case is a claim only for fair compensation, and that the effort of the United States to resist that payment is an effort to save itself the payment of a sum due in fairness and justice, on the assumption that the Secretary of the Treasury would not have decided the case in accordance with the facts if it had been submitted to him.

NINTH POINT.

The proposition is well settled that the question of the construing of Acts containing such language as that of this Act is to be determined by the intent of the Legislature. The argument of the petitioner seems to be that when Congress said "the Secretary of the Treasury is authorized" to do what is manifestly a just and righteous act, it meant that the Secretary of the Treasury was authorized *not to do that very act*. We submit that no such intent can be charged upon Congress. As the Circuit Court of Appeals in its opinion says: "It seems quite apparent that the intent of the Legislature was to afford relief to unfortunate importers who might be able to satisfy the Secretary by sufficient proof that they came within the terms of the Section." And the making of the perpetual annual appropriation for such payments plainly shows that such was the intent. It could not have been the intent of Congress that the Secretary of the Treasury might have the power to *refuse the relief* to the unfortunate importers which the statute awards.

he question involved is not of any great im-
ance as to amount. The cases in which goods
destroyed under such circumstances as bring
n within the purview of the Statute, are few.
this case the only amount involved is Six
dred Dollars. But, aside from the question of
ount, the question whether the United States
ernment shall or shall not do the thing that
ight and fair, and whether it shall be assumed
not that the Secretary of the Treasury would re-
e to do a just act which he was authorized to
is a question of importance. That question
s been passed upon by the Circuit Court of Ap-
ls, and rightly decided.

TENTH POINT.

The prayer of the petition, therefore should be
used.

R. D. BENEDICT,

Advocate for Cornell Steamboat Company,
Respondent.

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FILED
APR 16 1906
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States

THE UNITED STATES,
Petitioner.

v.

THE CORNELL STEAMBOAT CO.

No. 239.

Brief and Points for the Cornell S. B. Co.

This case is brought by certiorari to review a decree of the U. S. Circuit Court of Appeals for the Second Circuit made on March 13, 1905, affirming a decree rendered by the District Court of the Southern District of New York against the United States in favor of the Steamboat Co. for the sum of $603.60.

The suit against the United States was brought under the Tucker Act.

The case was disposed of in the District Court on a demurrer to the petition.

FIRST POINT.

The claim of the Cornell Steamboat Co. which is resisted by the Government of the United States is founded on the principle laid down by the Supreme Court of the United States in the case of The Davis (10 Wallace R., p. 19) in these words:

"When the property of the Government has been saved from destruction by salvors *justice and*

sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes upon all other property in like condition."

SECOND POINT.

The case came before the District Court of the United States for the Southern District of New York on a petition under the Tucker Act and a *demurrer* to that petition by the United States.

The facts stated in the petition are therefore admitted.

Those facts, thus admitted, are as follows:

That the barge Bangor, loaded with 1,883 bags of sugar, while in the waters of the port of New York, was in danger of being destroyed by fire.

That the petitioner's tug, at great risk and peril, saved the lighter and the sugar from destruction by said fire.

That the sugar was subject to duty and was still in the possession and under the control of Custom House officers of the United States.

That the owners of the lighter paid salvage.

That the petitioner filed a libel against the sugar in the District Court for the Eastern District of New York to recover salvage, and that in that case that Court made a decree, a copy of which is attached to the petition.

That by the services the sum of $6,000 in duties was saved to the United States.

The decree, which is also admitted, decided that the duties on the sugar, amounting to $6,000, had been paid to the Government of the United States and that "if the sugars had been burned the claimants (the owners of the sugar) would have been entitled to a rebate of said duties," and that the amount of the award to the libellants for the salvage services is fixed at ten per cent. of the value of the property saved.

And it awarded ten per cent. of the market value of the sugars, less the amount of the duties, $6,000.

And therefore the District Court awarded to the Cornell Steamboat Co. 10 per cent. of the $6,000 which had thus, as was admitted, been saved to the United States.

THIRD POINT.

It has been held by various courts that the United States Government is liable to pay salvage. In this the Government differs from an ordinary shipowner only in the form in which it must be sued, and in the fact that no attachment can be made of its vessel to which the service was rendered. But its liability to pay salvage—not compensation for work, labor and services, but *salvage*, with all that the word means—has been affirmed by the Supreme Court, by the Court of Claims, by the Circuit Courts of Appeal for the Fourth and Second Circuits, by the Circuit Court for the District of Connecticut, and by the District Court for the Northern District of California, and has never been denied by any court. It would seem, therefore, as though the matter were well settled.

The first case is *The Davis, 10 Wall., 15*, in which the Supreme Court says as follows:

> "Two questions are raised by the record in this case, both of which are important. The first is whether personal property of the United States on board a vessel for transportation from one port to another is subject to a lien for salvage services rendered in saving the property. * * * Of the first proposition there does not seem to be any reasonable doubt, upon a view of the authorities. * * * The proposition is treated by the modern text writers as settled. We are quite satisfied with the reasons on which the principle rests, and are of opinion that when the property of the Government has been saved from destruction by salvors, or by

> those sacrifices which are compensated by a contribution in general average, justice and sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes on all other property in like condition."

The question of the liability of the Government to pay salvage, and the jurisdiction of the Court of Claims to hear salvage claims, was three times presented to the Court of Claims and decided in favor of the liability and the jurisdiction.

Gould v. *United States*, *1 Court of Claims*, *184*, was an action to recover salvage for services rendered to a Government lightship in distress, and a salvage award was made.

Bryan v. *United States*, *6 Court of Claims*, *128*, was an action brought to recover salvage for services rendered to a barge laden with military stores, the property of the Government. And while the Court dismissed the petition on the ground that no valuable services had been rendered, it reiterated its view that salvage is recoverable against the Government, and that the Court of Claims had jurisdiction to award salvage in a proper case.

In *McGowan* v. *United States*, *20 Court of Claims*, *147*, a claim for salvage for saving a Government tug in peril on the Missouri River, the Court declared that it "saw no reason for changing a conclusion which was reached fourteen years ago, and has remained unquestioned since," and awarded salvage for the service.

Three cases besides the present one have been decided under the Tucker Act to the same effect.

In *United States* v. *Morgan*, *99 Fed. Rep.*, *570*, the Circuit Court of Appeals for the Fourth Circuit sustained an award against the Government made by the Circuit Court for the Eastern District of Virginia for a salvage service rendered by a tug to a Government lightship adrift in Chesapeake Bay.

In *Hartford & N. Y. Trans. Co.* v. *United States, 138 Fed. Rep., 618*, the Circuit Court for the District of Connecticut awarded salvage for services rendered to a United States vessel on fire.

And in *Rees* v. *United States, 134 Fed. Rep., 146*, the District Court for the Northern District of California awarded salvage against the Government on account of the saving of certain property by the salvors from the wreck of the United States ship Yosemite.

We maintain that, in view of these decisions, the question of the liability of the United States to pay salvage in a proper case is not open to argument. The law which sustains such a claim is but a form of the general and ancient rule that "the United States, in relation to the proprietorship of real or personal property, have, in their public capacity, like authority and remedies, and are *subject to like liabilities in dealing with* it through legal agencies or otherwise as natural persons."

> *Eight Hundred and Fifty-eight Bales of Cotton, Blatchford's Prize Cases, 325.*

When the United States allows itself to be sued before the Court, it must stand before the Court like any other party before the Court, affected by the same considerations as any other party.

> "When the Government engages in the making and negotiation of commercial paper, it submits itself to the settled rules of commercial law, and in that respect stands before the Courts of law, whenever jurisdiction is properly obtained, to receive the application of those rules precisely as they would be applied to an individual."
>
> Cooke *v.* The U. S., 10 Blatch., p. 59.
> 858 Bales of Cotton, Bl. Pr. Cas., 325.

"The United States, when they contract with their citizens, are controlled by the same laws

that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."

U. S. *v.* Bostwick, 94 U. S., 53, 66.

And the principle that in Court a man shall be held to have undertaken to do what he ought to do must be as applicable to the United States when it is sued, as to any citizen of the United States.

FOURTH POINT.

It was argued for the Government on the Brief in support of the petition for the certiorari that the District Court had no juridiction, "the suit being under a Revenue Law."

But the statement is an error. The suit is not "under a Revenue Law." It is a suit under the general Maritime law.

In the case of Ferry Co. *v.* The U. S. (85 F. R., 551), which seems to have been relied on to sustain the above statement, the suit was brought to reverse a decision which had been made by the Secretary of the Treasury and the Court held it had no power to reverse. We fail to see any similarity between that case and the present one.

FIFTH POINT.

It is claimed that the suit for salvage cannot lie here, because the United States did not request the service. That proof of a specific request is not necessary is held in all the cases above cited, for in none of them was there proof of any specific request by the United States. The "implied contract grow-

ing out of the successful event of the service" (99 F. R., 572) has always been held sufficient ground for the jurisdiction of the Court to award salvage.

The case of The Sabine (101 U. S., 384) is referred to. But that was a proceeding *in personam* against consignees of cargo who were not owners of it, and it was very properly held that the *consignees* of the property could not be held unless there was proof of a request by them. But the distinction between the personal liability of owners and of mere consignees is plainly pointed out.

SIXTH POINT.

But the claim is made on behalf of the Government that the construction of Section 2984 of the Revised Statutes is involved in this case, and that the Circuit Court of Appeals in its decision wrongly construed that section.

It is claimed that although the case comes up on demurrer which admits all the facts, and although if this sugar had been destroyed by this fire, its owners would have been entitled to claim a repayment of the $6,000 duties by the United States, yet that the Secretary of the Treasury might have refused to pay the duties back, even if all the facts which called for such payment had been proved to him, and that therefore the United States was in no danger of losing anything if the sugar had been burned, because, as the Statute says that the Secretary is "authorized" to pay, he had the power to refuse the repayment of the duty, even though the facts were such as to make his refusal an arbitrary and wrongful act.

In other words, the proposition is that the Secretary of the Treasury had the power to do an unjust and unrighteous action, and that, because he had that power, it cannot be argued that he would be

called upon to do the act which was right and just. That is certainly not a proposition which should commend itself to this Court.

On the contrary, as this Court said in the case of Gibbons *v.* The United States, 8 Wall., 269: "The supposition that the Government will not do justice is not to be indulged." Nor should the supposition that the Secretary of the Treasury would not do justice be indulged.

The decision of the Circuit Court of Appeals in this case that under this Statute the Secretary would, on the facts here admitted, *be required* to refund these duties is sustained by many authorities and decisions of this Court and other courts.

In the case of the Supervisors *v.* The United States, 4 Wall., 435, 446, this Court, in giving construction to a similar statute, used the following language:

> "The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the Act before us, or in equivalent language" (and it cannot be argued that the language of this statute is not equivalent language), "whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given not for their benefit, but for his. It is placed with the depository to meet the demands of right and to prevent a failure of justice."

In the case of The City of Galena *v.* Amy, 5 Wall., 708, where the word "may" was used in a statute, this Court said that under the circumstances the discretion given by it to the City Council could not "be resolved in the negative." "The power is in the nature of a trust for his benefit."

And again, in French *v.* Edwards, 13 Wall., 511, this Court said: "Where the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and

by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory."

In the case of Ralston *v.* Crittenden, 13 Fed. Rep., 512, the Circuit Court of Missouri, McCrery, *J.*, said:

> "Even if the terms of the statute were permissive only, and meant no more than the words generally employed in the statutes empowering a grant of authority or power to a public officer to do a certain act, still it is well settled that such acts are to be construed as mandatory whenever the public interest or *individual rights* call for the exercise of the power conferred."

The above cases are referred to.

In the case of New Orleans National Bank *v.* Merchant, 18 Fed. Rep., 841, in which the question was under section 2999 of the Revised Statutes, which provides that the Postmaster-General "*may*, upon evidence satisfactory to him, &c., instruct postmasters," the Circuit Court held that that law

> "gave to the Postmaster-General no authority to suspend action. Upon evidence satisfactory to him *he must act*," and

the case of Supervisors *v.* U. S., 4 Wallace, 445, from which we have quoted above, is cited as a controlling authority.

In the case of The National Bank of the Republic *v.* The City of St. Joseph, 31 Fed. Rep., 216, where it had been provided by statute that the Mayor and Councilmen "may levy and collect a special annual tax," &c., the Circuit Court, Wallace, *J.*, says:

> "The proposition seems almost too plain to require discussion that it is the intention of section 3, evinced in plain and explicit language, to empower the Mayor and Councilmen to call in and pay off, whenever they may deem it proper to do so, the whole or any part of the bonded indebtedness of the city. The exercise of the power, though permissive merely in its terms, is a duty which these officers are bound

to fulfill." (Supervisors *v.* U. S., 4 Wall., 435.) "It is a power to be held and exercised for the benefit of the public from time to time, as occasion requires."

In the case of Provisional Municipality of Pensacola *v.* Lehman, 27 Fed. Rep., 324, 332, the Circuit Court of Appeals for the Fifth Circuit said:

> "The authorities are to the extent that when authority is given under a statute, whether by the word 'may' or other permissive words, for an act to be done by a public officer, and it concerns the public interest, or is *for the benefit of third persons*, it is mandatory. There seems to be no doubt that if the words, 'and it should appear equitable to said board that such conveyance should be made,' had been omitted from the first section of the statute, the statute would have been mandatory." Citing the same cases.
>
> "With those words in the statute it would seem, under the authority of Supervisors *v.* U. S., that unless there should be, in fact, equitable reasons against making such conveyance the statute would still be mandatory."

In the case of The City of Little Rock *v.* The U. S., 103 Fed. Rep., 324, the language of this Court in the case of Supervisors *v.* The U. S., 4 Wall., 435, is quoted as a conclusive answer to the contention made that the statute did not declare that the officers of the city *should* exercise the power to issue the warrants.

In the case of The Village of Kent *v.* The U. S., 113 Fed. Rep., 237, where the statute did not say that the village *should* levy the tax, the Circuit Court of Appeals, in the Sixth Circuit, said:

> "It is argued that this statute is merely an enabling one to permit the Council to levy as much for this purpose as they shall see fit. But it is well settled in statutory interpretation that the word 'may' may be read 'shall.'"

The Court then quotes the language in Rock Island Company Supervisors *v.* The United States, 4th Wall., which we have quoted above, and proceeds:

> "This language seems to us applicable to the statute under consideration. The power to levy this tax is given for the benefit of creditors, in this case, to meet a demand adjudicated to be right and proper after full trial. It imposes a duty upon the council, which, in our judgment, they are required to exercise as long as they are able to do so within the limit imposed by the law upon the amount of taxation for any given year. We therefore construe this section as though it read, 'The council shall levy a sum sufficient to pay the interest on the public debt to be applied for no other purpose.' We find nothing in the case cited by counsel for plaintiff in error (U. S. *v.* Thoman, 156 U. S., 358) that is in conflict with this view."

In the case of the People *v.* Supervisors of Otsego Co., 51 N. Y., 401, it appeared that a statute had been passed by which the Supervisors were "*authorized and empowered* upon the application of any party aggrieved," to hear and determine a claim for repayment of taxes paid on property exempt from taxation, "and to repay to the proper person the amount collected or paid." The relator had paid taxes on property exempt and applied to the Supervisors for repayment. They had refused to repay them and the Court of Appeals held that the words "authorized and empowered" were "mandatory and imperative," and affirmed a judgment directing the Supervisors to act and repay the amount. The opinion cites abundant authorities to sustain its position. Among others it quotes from Supervisors *v.* U. S., 4 Wallace, 435, the language which we have quoted above.

Says Judge Field in the Chinese Laborers' case, 13 F. R., 291, 294: "All laws should be so construed, if possible, as to avoid an unjust or an absurd conclusion.

"General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence" (U. S. *v.* Kirby, 7 Wall., 482).

Any construction of the statute under consideration in the case at bar which would hold that the Secretary of the Treasury, although all the facts were proved without contradiction before him which the statute requires, might arbitrarily refuse to make the payment, simply because the word in the statute is "authorized," would certainly be an authorization of injustice. It is difficult to say whether such a refusal would be more unjust, or more oppressive, or more absurd.

SEVENTH POINT.

But it is claimed that even if the sugar was saved under such circumstances that the United States would have been required, if it had been destroyed by the fire, to repay the $6,000, that was not such an interest as that the United States ought to pay salvage for the saving of the sugar.

The contrary rule has been laid down by the English Admiralty Court.

In the case of The 5 Steel Barges, (15 P. D. Rep., 142), cited in U. S. *v.* Morgan, 99 F. R., 570, a party had built five barges for the government of England, to be paid for by installments, one of which remained due. Salvage services were rendered to the five barges. Two of them were thereafter delivered to the Government, before any lien for salvage was asserted against them. The salvors filed a libel against the three undelivered barges *in rem*, and *against the owners of the two that had been delivered.*

The Court said: "I think it is perfectly clear on the authorities that an action *in personam* lies

against the owners of a vessel which has been transferred to others, and the lien lost."

The Court then held that the property in these two barges was not in the defendants, but in the Government, and said: "But on this point I am of opinion that the right to sue *in personam* is not confined to the case of a defendant being the legal owner of the property saved. I think it exists in cases where the defendant has an interest in the property saved which interest has been saved by the fact that the property is brought into a position of security."

"The claim of salvage" said the Court further, "is a legal liability, arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it, shall make the remuneration to those who have conferred the benefit, notwithstanding that he has not entered into any contract on the subject."

"I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property."

"If defendants had not been in a position to deliver the barges within the twelve months" * * * they would have been "liable to make restitution of the installments which had been paid them on conditions not fulfilled by them. I think, therefore, that they had substantially an interest to the full amount of the barges at the time of the services."

And the Court gave a decree for the libellants.

This case of the Five Steel Barges was fully considered by the Admiralty Court and the High Court of Justice in England in the case of the Port Victor (Aspinall's Maritime Law Cases, vol. 9 pp. 163 and 182), and unhesitatingly sustained.

Justice Jeune in his decision says (p. 166): "The true view is, I think, that the law of Admiralty imposes on the owners of property saved an obligation to pay the person who saved it, simply because, in the *view of that system of law, it is just that he should* and *this conception of justice* naturally im-

poses a proportionate obligation upon *any person whose interest in the property is real* though falling short of that of ownership. I see no reason, therefore, why I should not follow the view of Lord Hannen and of the Scotch Court of Session, that *a man who has had a benefit arising out of the saving of the property* is liable to a claim for salvage no less than the owner of it."

The case being taken by appeal to the High Court of Justice was affirmed (p. 183). Lord Alverstone in his opinion said: "Speaking for myself I really feel almost bound by the authority of so great a lawyer on such a subject as Sir James Hannen, under circumstances practically identical with the circumstances of the present case. I should hesitate a very long time to overrule his decision in the case of the Five Steel Barges." And he quotes from the opinion in that case the language which we have quoted above.

Judge Smith agreeing with Lord Alverstone, said (p. 184): "We have, independently of each other, four Scotch Judges and afterwards Sir James Hannen, spontaneously arriving at the same conclusion. Now we are asked in the year 1901 to say that all of those five learned Judges were wrong in what they decided in those cases. I myself am prepared to rest my judgment upon the judgment of Sir James Hannen; and I will say this, that having read that judgment through twice, *I consider it is founded on common sense and I refuse to say it is wrong.*"

Now in 1906 this Court is asked to say that "all of those five learned Judges, supported as they have been by the high authority of Judge Jeune and of Lord Alverstone and his two associates and of the Circuit Court of Appeals in this case were "wrong in what they decided," and that no weight is to be given to the considerations of "justice" and "common sense," on which those decisions are founded.

The Court will hardly come to such a conclusion.

EIGHTH POINT.

The Circuit Court of Appeals held that as the Government had a lien on these sugars till the duties were paid, and (Record fol. 32) which would have been lost if the sugars were burned, the Government had such an interest in these sugars as made the rule laid down by the English Admiralty law applicable.

That the Government had such a lien is well settled (U. S. *v.* Boxes of Pipes, 2 Abbott's Reports, 500; U. S. *v.* George, 6 Blatchford Rep., 415).

And the Admiralty law being governed everywhere by the same principles and rules of equity and justice, and no reason of equity or justice existing why this interest should go free and the Cornell Steamboat Co. should not receive the same rate of compensation for saving all interests.

The decree of the Circuit Court of Appeals in this case should be affirmed.

BENEDICT & BENEDICT,
Proctors for Appellee.

R. D. BENEDICT,
Advocate.

Supreme Court of the United States.

No. 239.—October Term, 1905.

United States, Petitioner, vs. Cornell Steamboat Company. } On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 14, 1906.]

This was a petition under what is known as the Tucker Act, defining the jurisdiction of the Court of Claims, to recover salvage upon the duties on 1,883 bags of sugar, cargo of the lighter Bangor.

The facts agreed upon and found by the Court are substantially as follows:

The Steamboat Company, a New York corporation, and owner of the steam tug R. G. Townsend, at great risk and peril to the tug, saved a certain lot of 1,883 bags of sugar on board of a lighter called the Bangor, in the waters of the port of New York, which was in danger of being destroyed by fire. The sugar had been imported from a foreign country, was subject to duty under the laws of the United States, and at the time of the fire had not been delivered to the consignees, and was still in the possession and control of the customs officers. The duties on this sugar amounting to $6,000 had been paid to the Government.

Petitioner filed a libel in the District Court against the cargo to recover salvage compensation for services rendered in saving the sugar. The case resulted in a decree awarding the petitioner salvage, amounting to ten per cent of the value of the property saved, viz., $1,274.03. (108 Fed. Rep. 277.) In fixing this sum the District Court considered the invoice value of the sugar only, excluding salvage upon the duties saved to the United States by the salving services.

Upon these facts the District Court awarded the appellant ten per cent upon the amount of the duties saved to the United States, namely, $600, with clerk's fees, $3.60. (130 Fed. Rep. 480.) The Circuit Court of Appeals affirmed this judgment, (137 Fed. Rep. 455,) whereupon the United States applied for this writ of certiorari.

Mr. Justice Brown delivered the opinion of the Court.

This is practically a libel *in personam* for the salvage of Government property, viz., of $6,000 duties collected by the Government upon a cargo

of sugar saved from loss by fire, while on board a lighter in the harbor of New York.

The claim is prosecuted under what is known as the Tucker Act, (24 Stat. 505; Compiled Stat. 1901, pp. 752–753,) the first section of which declares that "the Court of Claims shall have jurisdiction to hear and determine . . . all claims founded upon the Constitution of the United States, or any law of Congress, . . . or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a Court of law, equity or admiralty, if the United States were suable."

By the second section concurrent jurisdiction with the Court of Claims was vested in the District Courts as to all claims not exceeding $1,000.

It is at least doubtful whether an ordinary claim for salvage can be said to arise upon contract, inasmuch as such services are rendered voluntarily, frequently in the absence of the owner of the property, and usually without a definite agreement for compensation. (*The Liffey*, 6 Asp. M. L. C. 255; *Five Steel Barges*, 15 L. D. 142.) A claim for salvage may undoubtedly be founded upon an express contract, but where the services are rendered, as in this case, without request of an officer of the Government, and particularly where they are incidental to services rendered in the saving of private property, we do not think the claim can be said to arise upon any contract, express or implied, with the Government of the United States. But the claim may properly be said to be one for unliquidated damages in a case "not sounding in tort," in respect of which the party would be entitled to redress in a Court of Admiralty, if the United States were suable.

The Tucker Act also resolves any doubt which might arise as to the responsibility of Government property for salvage service, since it was the very object of the act to give a direct recourse against the Government. Indeed, that question was settled by this Court in 1869, in the case of *The Davis*, (10 Wall. 15,) in which personal property of the United States, in transit from one port to another, was held liable to a lien for salvage services rendered in saving the property, following the rule laid down in England in *The Marquis of Huntly*, (3 Haggard, 247,) and *The Lord Nelson*, (Edward's Admiralty, 79.) The same rule was adopted by Mr. Justice Story in *United States* v. *Wilder*, (3 Sumner, 308,) although both in England and in this country vessels belonging to the United States, or to a foreign sovereign, and engaged in the public service, are exempt from seizure. (*The Exchange*, 7 Cranch, 116; *The Charkieh*, L. R. 4 A. & E. 50; *The Constitution*, 4 P. D. 39; *The Parlement Belge*, 4 Asp. M. L. C. 234; 5 P. D. 197.)

The fact, however, that the property saved is not within the physical possession of the Court, but is of an intangible nature, like freight or customs dues, does not prevent the maintenance of a libel *in personam* against the owner. Indeed, General Admiralty Rule No. 19 provides that "in all suits for salvage the suit may be *in rem* . . . or *in personam* against the party at whose request and for whose benefit the salvage services have been performed." In the case of freight the practice is to require its payment into Court. (*The Leo*, Lush. 444.)

At the basis of the claim in this case lies the proposition that, although the duties had been actually paid before the services had been rendered, the Secretary of the Treasury was *authorized* to refund duties upon so much of the sugar as would have been lost by the fire had not the cargo been rescued by the salvors. The obligation to refund such duties is contained in the following sections of the Revised Statutes:

"SEC. 2984. The Secretary of the Treasury is hereby authorized, upon production of satisfactory proof to him of the actual injury or destruction, in whole or in part, of any merchandise, by accidental fire or other casualty, while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, . . . or while in custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon, and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be."

Provision for such abatements or refunds is made in:

"SEC. 3689. There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same, respectively; and such appropriation shall be deemed permanent annual appropriations. . . . For refunding duties paid or accruing on goods, wares, or merchandise injured or destroyed by accidental fire or other casualty while in the custody of the officers of customs, in any public or private warehouse, . . . or after their arrival within the limits of any port of entry of the United States, and before the same have been landed under the supervision of the officers of the customs."

It was held by both Courts below, and we think properly, that, if the Government were liable to refund these duties in case the property had been destroyed by fire, it was under the same obligation to pay salvage on such duties as it would have been, had property of the Government of the same value been directly saved by the exertions of the salvors.

It is true that the language of section 2984 is permissive, and merely "authorizes" the Secretary of the Treasury to abate or refund duties collected upon merchandise injured or destroyed by accidental fire or

other casualty, and does not in terms *require* that this shall be done. We do not find it necessary, however, to go deeply into the learning expended upon the distinction between permissive and mandatory clauses, or to determine whether in a particular case mandamus would or would not lie against the Secretary for refusing to refund or abate duties in that connection. (*D. M. Ferry & Co.* v. *United States*, 85 Fed. Rep. 550.) Under the circumstances of this case, as set forth in the petition and agreed findings of fact, we are entitled to assume that the Secretary of the Treasury would have refunded these duties in case of the accidental loss of this sugar by fire, since the authority to do so is found in section 2984, and the money is appropriated for such refunding by section 3689. In a particular case we can imagine that doubts might arise as to the propriety of such refunding, but where a plain case is made in the findings of fact, and is not disputed, it would be an imputation upon the good faith of the Secretary to assume that he would refuse to return the duties, notwithstanding the language of the statute may be construed as permissive merely. We think the petitioner is entitled to build his case upon this assumption. (*Supervisors* v. *United States*, 4 Wall. 435; *Galena* v. *Amy*, 5 Wall. 704; *French* v. *Edwards*, 13 Wall. 506.)

It is insisted, however, that the Government is under no greater liability to pay this claim than it would have been if the duties had not been paid, and that the law is well settled that when property is saved at sea and brought into port, it is subject to duty like other property, that the Government owes nothing to the salvors, and by parity of reasoning that no insurer of goods saved, nor a creditor who has advanced money thereon, nor a seaman whose wages are preserved, can be made liable for salvage. The obvious reason for this is that the claim for salvage is founded upon the possession of the property saved at the time of the salvage service, and that the person incidentally benefited cannot be made liable under General Admiralty Rule 19, unless he has requested the salvage, or the service has been performed directly for his benefit. Interpreting this rule in the case of *The Sabine*, (101 U. S. 384,) it was held that a libel would not lie *in rem* against the vessel and *in personam* against the consignee of the cargo. But the mere possession of property may be in itself not only the origin of a right but the creation of a liability—as, for instance, in cases of money had and received or property lawfully acquired but unlawfully detained. Had the duties upon these goods not been collected, the Government could not have been held liable, since the services would not have been performed for its benefit, although as a remote consequence therefrom it might have been advantaged.

The case of *The Five Steel Barges*, (15 P. D. 142,) is authority for the proposition that the remedy *in personam* is not confined to the legal owner

of the property saved, but extends to one who has a direct pecuniary interest in such property. This was an action against five barges, two of which belonged to the Government, with whom the defendants were under contract to build and deliver the barges. An action *in rem* was brought against the three barges, and an action *in personam* against the defendants, who had contracted with the Government and given it possession of the two barges. The Court sustained the action *in personam*, thinking it "perfectly clear that an action *in personam* lies against the owners of a vessel which has been saved, even though the property has been transferred to others and the lien lost." Continuing, the President of the Court, Sir James Hannen, observed: "I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which the Court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract, but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved; that the owner of the property, who has had the benefit of it, shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had the benefit arising out of the saving of the property." This last sentence is particularly applicable to this case.

In the subsequent case of *The Port Victor*, (9 Asp. M. L. C. 163,) the same Court decided that where Government stores were being carried at the risk of charterers, these charterers were liable to pay salvage in a *personam* action apart from the liability of the stores *in rem*. The case was decided largely upon the authority of *The Five Steel Barges* and *Duncan* v. *Dundee etc. Shipping Company*, in the Court of Sessions in Scotland, (4th Series, vol. 5, p. 742,) and was affirmed by the Court of Appeals in an opinion by Lord Alverstone, (9 Asp. Mar. Cases, 182,) in which great deference was shown to the decision of Sir James Hannen. See also Carver on Carriage by Sea, sec. 324*a*.

Although Courts of Admiralty have no general equity jurisdiction and cannot afford equitable relief in a direct proceeding for that purpose, they may apply equitable principles to subjects within their jurisdiction, and in the distribution of proceeds in their possession or under their control may give effect to equitable claims. (2 Parsons on Shipping, 344.) Bearing in mind that the duties in this case had been actually collected, were in the hands of the Government and had been saved to it by the exertion of the salvors, who had been awarded salvage for saving the sugars upon which the duties had been collected, a strong case is presented for the allowance of salvage, which should not be lost sight of in determining the principles applicable to the situation.

The case is clearly not one arising under the revenue laws as they are defined in *Nichols* v. *The United States*, (7 Wall. 122,) since the sections of the Revised Statutes above quoted are only incidentally involved.

The decree of the Circuit Court of Appeals is, therefore,

Affirmed.

Mr. Chief Justice FULLER dissented.

True copy.

Test:

Clerk Supreme Court, U. S.